CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

JUNE TERM, 1831.

DEN *ex dem.* of WILLIAM DAVIDSON v. ANN FREW.

A sale of land under process of execution, defeats the estate of the defendant, and bars the dower of his widow, although the purchaser does not take his deed until after the assignment of dower.

The case of *Frost* v. *Etheridge*, (*ante* 1 vol. 30,) approved and followed.

EJECTMENT, tried before his Honor Judge MARTIN, at Mecklenburg, on the last circuit, when the following facts were given in evidence. The lessor of the plaintiff purchased at a sale made by the Marshal, under a warrant of distress issued against *Archibald Frew*, the husband of the defendant, by the Secretary of the Treasury. After the sale, *Frew* continued in possession until his death; when dower in the premises was assigned to the defendant. The lessor of the plaintiff did not take a deed from the Marshall, until after the assignment of dower to the defendant. The only question was, whether the subsequent execution of the Marshal's deed divested the title of the defendant, as tenant in dower.

The jury, under the directions of the Judge, found a verdict for the plaintiff, and the defendant appealed.

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Devereux, for the defendant, was asked by RUFFIN, Judge, if the case was susceptible of an argument on his side. The counsel cited *Jackson* v. *Catlin* (8 *John. Rep.* 520) *Jackson* v. *Terry* (13 *do.* 471) and *Frost* v. *Etheridge* (*ante*, 1, *vol.* 30) and attended, that in principle, the present case could not be distinguished from that last cited.

Gaston, for the plaintiff, was stopped by the Court.

HENDERSON, Chief-Justice.—It was said at the bar, that this case was the same in principle as *Frost* v. *Etheridge*, but I think it is very distinguishable from it. That was the case of a levy on lands in the husband's lifetime, and sale after his death under a *fieri facias*. This, where both levy and sale were in the husband's lifetime; but the Marshal's deed was executed to the purchaser after the husband's death. In the case of *Frost* v. *Etheridge*, it was held, that the levy did not divest or disturb the husband's seisin; and that the purchaser was in from the purchase, not from the time of the levy, or *teste* of the *fieri facias*. But the lien or charge on the land, arising from the *teste* of the writ of *fieri facias*, was only against those who came in by contract with the defendant; and not as to those who came in by operation of law; that the lien was created by law, to protect the estate from the fraudulent acts of the defendant in the execution; and to that end, all liens or transfers of the estate by him, after the *teste* of the execution, were made fraudulent in law, whatever might have been the actual intent; but that where such fraudulent intent could not be imputed from the nature of the claim, there such presumption could not apply. And such was the nature of the widow's claim to dower, in which no presumption of fraud could arise. For it could not be supposed, that her husband died to defeat the creditor. She was therefore entitled to dower. But the

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present is a case, where there was an actual sale, which, if evidenced in the manner prescribed by law, entirely defeated the husband's estate, not by a fiction or relation to guard the estate from the acts or claims of any one, but an *ipso facto* determination of it. I do not mean to say, that the bare act of sale, or crying out the property, passes the title of land, or even returning it on the execution. But when the deed is afterwards made in conformity to the sale, the title to the estate is taken out of the defendant in the execution, and vested in the purchaser, from the time of the sale, whatever may be the effect on the possession: I mean the intermediate possession between the sale and the deed. I do not intend in this, to overrule the case of *McMillan* v. *Hapley*, (2 *Law Rep.* 89) where it was decided, that an action of trespass will not lie for the purchaser, for an intermediate trespass. For the doctriue of that case does not stand in the way of this; and it may be sustained possibly upon something peculiar to the action of trespass. But I am much disposed to doubt its correctness.

A sheriff's deed vests the title of land in the purchaser from the time of the sale.

The case of *McMillan* v *Hapley* (2 *Law Rep.* 89) doubted by HENDERSON, Chief-Justice.

We are all of opinion, that the Sheriff's or Marshal's deed, so far as regards title, relates to the time of the sale, and divests the estate from the sale, and vests it in the purchaser, and gives to him the rights, and imposes on him the obligations of the legal owner, whether or not in analogy to the execution of a power, I am not disposed to say; but I rather think, that it is upon the ground that it evidences a transaction; to-wit, the sale, which divested the title.

PER CURIAM.—JUDGMENT AFFIRMED.

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DEN *ex dem.* WILLIAM PICKETT v. HENRY PICKETT.

Supra 171
4 D. & B. 306

In an appeal to the Supreme Court, if the case stated does not contain *the facts* to which the charge of the Judge was applied, however erroneous the charge itself may be, as an abstract proposition, still the judgment must be affirmed. A judgment is not reversed, because it does not appear to be right; it must be affirmed, unless it appear to be wrong.

EJECTMENT, tried at Duplin on the last circuit, before his Honor Judge STRANGE.

"The lessor of the plaintiff claimed under an execu-
"tion sale against one *James Pickett*, the father of the
"defendant, who had previously made a deed of bar-
"gain and sale to the defendant for the same land—
"which deed the lessor of the plaintiff alleged to be frau-
"dulent. The defendant contended that his deed was
"not fraudulent, and that if it was, he had been in the
"undisturbed adverse possession of the land under it,
"for more than seven years, and had thereby rendered
"perfect a title which might have been originally invalid.

"It was in evidence, that *James Pickett* remained in
"possession of the land after the deed made to his son,
"and even after the purchase by the lessor of the plain-
"tiff at the execution sale, and the lessor of the plaintiff
"offered to prove, that *James Pickett* had been heard to
"say, after the execution sale, that he remained in pos-
"session of the land by the permission of the lessor of
"the plaintiff. But this evidence being objected to by
"the counsel for the defendant, and it appearing that
"the declaration was not made in the personal presence
"of the defendant, it was rejected by the court.

"The Judge charged the jury, that although they
"might believe the deed to be fraudulent, if the defend-
"ant had remained in the undisturbed adverse posses-
"sion of the land under it for seven years and upwards,
"they ought to find for the defendant. That from the

"time of the lessor of the plaintiff's purchase at execu-
"tion sale, the defendant's possession was adverse to
"him, without evidence of some kind qualifying the na-
"ture of that possession."

A verdict was returned for the defendant, and the lessor of the plaintiff appealed.

Gaston, for the plaintiff, contended, 1st. That the declarations of *James Pickett* were improperly rejected, and cited *Pyke* v. *Crouch* (*Lord Ray.* 730) *Aveson* v. *Lord Kinniard* (6 *East* 188–192) *Bateman* v. *Bailey* (5 *Term Rep.* 512) *Davis* v. *Pierce* (2 *do.* 53) *Human* v. *Pettitt* (7 *Eng. C. L. Rep.* 75) *Rawson* v. *Haigh* (9 *do.* 885) *Uncle* v. *Watson* (4 *Taun.* 16) *Cherry* v. *Slade* (2 *Hawks* 400) *Jackson* v. *Vredenbergh* (1 *John Rep.* 159–163).

2d. That the possession of *James Pickett* was not in law adverse to the title of the lessor of the Plaintiff, and for this he cited *M'Dougall* v. *Sitcher* (1 *John. Rep.* 42) *Jackson* v. *Steinberg* (1 *John. Cases* 152) *Jackson* v. *Graham* (3 *Caines' Rep.* 188).

W. C. Stanley & Badger, contra, contended, that the declarations of *James Pickett*, could not be received under any circumstances, and particularly as it did not appear that he was dead. They also contended, that a fraudulent deed was colour of title, and cited *Clarke* v. *Waite* (12 *Mass. Rep.* 439) *Bridge* v. *Eggleston* (14 *do.* 245) and *Riddick* v. *Leggat* (3 *Murp.* 539).

RUFFIN, Judge.—The general rule of evidence is, that the declarations of one person, cannot be heard against another. He who offers them must bring the case within some established exception. Commonly, the declarations of a deceased occupier of land, made while he occupied, as to the particular person under whom he held, are evidence to show the tenancy. They are admitted from necessity. And it is deemed safe to admit them, because they are against the interest of the person

Declarations of a deceased tenant, made during his tenancy, as to the nature of his possession, are evidence in controversies between his landlord and others.

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making them, since they subject him to the action of the landlord for the rent, and for the recovery of the possession, which is, by the declaration, qualified from a *prima facie* seisin in fee to a tenancy of a particular estate. But declarations of one who had occupied land, made after he had left it, do not stand on the same ground. No case is found, in which they have been admitted; and it would be against principle to admit them. Nor do I find a case in which they have been received while the tenant was living. I do not say, that in such case they are not admissible; but I do not see any authority for it. And I incline to think they are not; because while the person himself can be called, there is no necessity for the hearsay; and necessity alone seems to justify such evidence. In this case, however, the other objection is decisive. For not only does the plaintiff fail to show the death of *James Pickett*; but he also fails to show, as far as stated in the case, that the declarations were made while he occupied. It is to be presumed that they were not; because it is stated only, that they were made after the execution sale, and that the ground of rejection was, that they were not made in the presence of the defendant: in which case, they would have been evidence, not as the declarations of *James*, but as the admissions of *Henry*. If, in fact, *James* was dead at the trial, and the declarations were made by him, while in possession of the land, it is much to be regretted, that the plaintiff did not have those facts inserted in the case. They would have raised the question debated here—whether they could have been heard against *James'* own previous deed to his son, and his occupation under him. But we cannot enter into that; because, at present, we must take it, that those declarations were not competent upon the general principle.

But this rule has its foundation in necessity, and does not apply where the tenant is alive, or where the declarations were made after the tenancy had ceased.

Upon the point made on the Judge's charge, the statements of the case are more defective, even, than on that

relating to the evidence. It sets forth, that "the Defendant contended, that if his deed was fraudulent, he had been in possession under it for more than seven years, and had thereby rendered his title valid." But it does not give *the facts*. It does not state the period of the purchase by the lessor of the plaintiff, or of the execution of the deed to him; nor the period of the defendant's purchase, and of his possession. The appellant must state, or cause to be stated the facts, on which the question is raised, in the decision of which he assigns the error of the court below. Without the facts, the opinions of the court assume the character of mere abstract propositions; and however erroneous, since they cannot be connected with the rights of the parties, a verdict, which settles those rights upon the merits, ought not to be disturbed. We cannot reverse a judgment, because it does not appear to be right upon the merits. It must be affirmed, unless it appear to be wrong. It is the province of the party to set down his case and exceptions truly, or to procure them to be set down by the Judge. It is but common charity—not to say, justice—to the Judge, to affirm that he will state or permit to be stated every fact, consistent with the truth, which the parties deem material to the point of the exception. Certainly a revising court is confined to the *facts stated*; and can no more imply others, that it can presume those set forth not to be true. Where there are no facts stated, there can be no error found, as having been committed at the trial. For then the facts are to be taken as alleged in the pleadings, and found in the verdict; so that the only error open for discussion here would be one assigned in arrest of judgment.

In the present case, therefore, the judgment must be affirmed; because from the case stated, enough does not appear to enable this court to determine, whether the opinion of the Superior Court—which, taken in reference to one probable state of the facts, is deemed right,—is

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erroneous, because the fact, not appearing, was otherwise. The furthest we can go is, to take the fact to be as assumed by the presiding Judge in the opinion given: which is always very unsatisfactory, because it is often difficult, and is so here, to determine what the assumpsion is.

The court first instructs the jury, that altho' the deed to the defendant was fraudulent, yet if he had been in possession seven years under it, they ought to find for him. Now whether this be true or not, depends upon the fact, whether the defendant's possession was before or after the sale by the creditor; and that does not appear, or at least, very indistinctly and by implication. It is the opinion of this court, that a fraudulent deed is void to *all* purposes, as against a creditor; and will no more bar him, as color of title, than as a conveyance.—The possession of a fraudulent grantee cannot be set up against the creditor defrauded. If it could, the period employed in establishing the debt might render it, when established, of no value. Until a sale by the creditor, there is no right or title to the thing fraudulently conveyed; there is no right of entry into or of action for the thing. Before such right accrues, the statute does not run. *Peterson* v. *Williamson* (*ante* 2 *vol.* 326). It may be here, that the possession of the defendant was in part, or even wholly before the sale to the lessor of the plaintiff. But if it was, it does not appear; and the judgment cannot be reversed upon the ground, that, possibly, it was erroneous.

Until the right of entry of a creditor accrues a fraudulent deed is void to all purposes as against him, whether offered as title, or as colour of title.

Indeed, from the succeeding instruction, we suppose it probable that the possession was after the lessor of the plaintiff's purchase. That instruction is, that from the time of the purchase, the possession of the defendant was adverse to the lessor of the plaintiff; whence it may be inferred, that *such* an adverse possession was the one contemplated by the court. And the opinion of this court is, that upon that state of facts, the instruction

But after a sale by the creditor if the possession of the fraudulent vendee be adverse to the purchaser, his fraudulent deed then becomes colour of title, and may be perfected by subsequent possession.

was right. For the reasons given by the Chief-Justice, in *Davidson* v. *Frew*, at this term, the sheriff's deed relates, for the purchaser's benefit, to the sale. By parity of reasoning it is so, when that relation operates against him. In both instances, the effect flows from the nature of a power or authority, and interests derived from the execution of them. *Lord Mansfield* has said, long ago, that since powers of appointment, or revocation and appointment, have been commonly inserted in deeds, and the execution of them a common mode of assurance, the power must be regarded as the estate, within the statute of limitations. Were it not so, the statute might as well be repealed; for it would be evaded, simply by creating a power. I do not mean, that the power must be executed within seven years at all events. For the possession, for instance, of a grantee in a deed, which reserves a power to the grantor, or confers one on a third person, or the possession of the heir at law, where a power to sell is given by will, is consistent with the power, and not adverse to it. But where the possession is in one claiming against the power, and also adversely to the estate upon which the power is to operate, the power will be barred, as well as the right itself. For when the estate is gone, the power becomes, necessarily, extinct.

A power over an estate, is regarded as the estate itself; and a possession adverse to that estate, will, under the statute of limitations, bar the power.

In precise analogy with this, is the case of a purchaser at a sheriff's sale. The sheriff can convey immediately after the sale; and if the purchaser will delay taking his deed, it is his own folly. It is immaterial, whether the sheriff's deed operates by way of passing a title that was in himself, or by way of executing an authority to pass that title which was in the debtor. The title is somewhere; and be it where it may, the possession of another, under a distinct title, is adverse to it. There is nothing left, upon which the authority, vested in the sheriff, can work. Against the creditor, it is true, that no length of time will be a bar; because he has no specific right in the thing; and because it would be an obstruction to the statutes against fraudulent con-

In analogy to this rule, if a purchase at a sheriff's sale neglect to take a deed for seven years, a possession with colour of title, adverse to the title conveyed by the sheriff, will bar the purchaser under the execution.

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veyances. It is likewise true, that the purchaser has not a legal title, until he gets a deed. But he has an inchoate right by his purchase, which is the principal ingredient of his title; and he has a perfect right to call for a conveyance, which the sheriff hath power to make; which will complete the title. No reason of policy or justice authorizes a delay in perfecting his title to the specific thing purchased. But the peace of society, the security of titles, and every other consideration which induces the enactment of statutes of repose, demand, that he should complete and enforce his title, within the time prescribed for other legal proprietors.

Supposing this to be the real case here, the judgment is affirmed, because it is approved by this court. If the fact be otherwise, it must likewise be affirmed, because enough is not stated to exhibit the error.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem.* of JOHN HOKE v. LAWSON HENDERSON.

Where a purchaser of land under an execution, against a fraudulent vendor, neglected to take his deed from the sheriff, and before its delivery, the fraudulent vendee entered into recognizance to the state, it was held, that though between the state and a subject, there is no priority obtained by the latter, from the relation of his execution, when they are pursuing the estate of a common debtor, yet as the land was primarily liable to the creditor of the vendor, the prerogative of the state did not operate, and that the sheriff's deed related to the sale.

A recognizance is a specific lien, which is not lost by suing out a *fi. fa.* The cases of *Peterson* v. *Williamson* (*ante*, *vol.* 2, *p.* 326) *Burton* v *Murphey* (2 *Murp.* 339) and the *State* v. *Magnis* (1 *Hay.* 99) approved by RUFFIN, Judge.

EJECTMENT, in which both parties claimed under *Robert Wier*.

The lessor of the plaintiff produced a judgment in favor of *John Wier* against *Robert Wier*, which was entered up at the Fall term, 1821, of Lincoln Superior Court,

executions upon which regularly issued until the fall term, 1822, when the lessor of the plaintiff purchased, but did not take a deed from the sheriff, until the 26th of April, 1827.

The lessor of the plaintiff also claimed title under two other sheriff's sales, made upon executions in favor of one *Wilson*, and one *Fulenwider*, which it is unnecessary to notice further.

The Defendant deduced his title as follows:

1st, By a deed from *Robert Wier*, to his son *Joseph Wier*, dated March 6, 1809.

2d. By proof of *Joseph Wier's* possession from the date of that deed, until November, 1825.

3d. He produced the record of a recognizance to the state, entered into by *Joseph Wier*, at the spring term, 1826, of Lincoln Superior Court, which was forfeited at the ensuing term, when process issued, and final judgment was afterwards entered in favor of the state; a *fi. fa.* issued on this judgment, and the defendant purchased in November, 1827.

It was in proof, that in March, 1809, the date of the deed from *Robert* to *Joseph*, a suit was pending in Orange Superior Court, at the instance of one *Robertson*, against *Robert Wier* for a malicious prosecution, in which final judgment was afterwards obtained for $ 500, and an execution upon which was satisfied. It was also proved, that *Robert Wier* lived on the land with his son *Joseph*.

His Honor Judge DANIEL charged the jury, that as the lessor of the plaintiff claimed under a judgment in favor of *John Wier*, a creditor of *Robert*, at the time of the conveyance by *Robert* to *Joseph*, in March, 1809, they ought to inquire, whether that conveyance was made to hinder, delay or defraud the creditors of *Robert Wier* —that it was unnecessary to enquire, whether *Robertson* was a creditor within the meaning of the 13th of *Elizabeth*; because the lessor of the plaintiff did not claim under him—that if they should think the deed of *Robert* to *Joseph* was fraudulent, as to *John Wier*, then they should find for the lessor of the plaintiff, unless the possession of *Joseph Wier* had ripened his defective title into

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a good one, and barred the entry of the lessor of the plaintiff—that under the act of 1715, a fraudulent deed was colour of title, and that if *Joseph Wier* continued in possession for the space of seven years, holding the land adversely to all the world, the lessor of the plaintiff would be barred by that act.

A verdict was returned for the defendant, and the lessor of the plaintiff appealed.

Seawell & Winston, for the lessor of the plaintiff.

Hogg, for the defendant, contended,

1st. That the state, by the recognizance, acquired the title of a purchaser, and that a *bona fide* purchaser from a vendee whose title was defective under the 13th *Elizabeth*, and who had no notice of that defect, acquired a valid title. For this he cited *Burton* v. *Murphey* (*N. C. Term Rep.* 259) *Anderson* v. *Roberts* (18 *John. Rep.* 515) *Robert's Fraudulent Conveyances* 392, 462.

2d. That the title to land sold by the sheriff did not pass until the execution of the deed. For this was cited *Simonds* v. *Catlin* (2 *Caines'* 60) *Jackson* v. *Catlin* (8 *John. Rep.* 520) *Jackson* v. *Terry* (13 *do.* 471) *Frost* v. *Etheridge* (*ante, vol.* 1, *p.* 30) *Lillington's case* (7 *Rep.* 38 *a*) *Butler & Baker's case* (3 *do.* 25).

3d. That no relation took place against the sovereign. *Viner's Ab. Relation, K, pl.* 3. *Butler* v. *Butler* (1 *East* 338) *Upham* v. *Sumner* (*Blk. Rep* 1294) *Rorke* v. *Daycell* (4 *Term Rep.* 402) *Rex* v. *Wells* (16 *East* 278) *Rex* v. *Sloper* (6 *Price* 114) *Scales* v. *Fewell* (3 *Hawks* 18) *Haughton* v. *Gray* (*do.* 21).

RUFFIN, Judge.—The first position of the judge of the Superior Court, that it was immaterial to inquire, whether the conveyance of *Robert Wier* to his son *Joseph* was intended to defraud *Robertson*, since neither party claimed under him, is contrary to what I have always considered the law; and contrary to the authorities. I conceive, that a conveyance in fraud of one creditor is void as to all creditors. It is upon this foundation, that

A conveyance fraudulent as to one creditor, is void as to all creditors.

that are called *fishing* bills are filed in Equity, to find out a creditor at the time of the conveyance, and to bring the whole fund into subjection to general creditors, including subsequent creditors, and *a fortiori*, other creditors at the time. (*Lush* v. *Wilkinson*, 5 *Ves.* 384. *Taylor* v. *Jones*, 2 *Atk.* 600.)

This court has likewise the misfortune to differ from the court below upon the next instruction given to the jury. The case of *Peterson* v. *Williamson*, (*ante* 2, *vol.* 326) and *Pickett* v. *Pickett*, decided at this term, establish, that the possession of a fraudulent grantee does not bar a creditor under the statute of limitations. The title is void to all intents, and this extends to the deed, when operating as color of title, as well as when offered as title itself. It will enure under the statute, against the purchaser under the creditor's execution, but not before. For these reasons the judgment below must be reversed, unless the record shows that, at all events, the defendant hath a better title, and must obtain a verdict upon a second trial.

A fraudulent deed is inoperative when offered as colour of title, as well as when offered as title itself.

But after a sale under a creditor's execution, it is colour of title against the purchaser.

The counsel for the defendant, admitting that he could not support the charge of the court, has insisted here, that the defendant has the better right. He founds his argument on this state of facts: That the lessor of the plaintiff, altho' he purchased under *John Wier's* execution against *Robert Wier*, in October 1822, obtained his deed on the 26th April 1827; and that *Joseph Wier* being in possession, entered into recognizance to the state in April 1826, on which execution afterwards issued, under which the defendant purchased the 22d October, 1827, and took a sheriff's deed in November following. It is insisted, in the first place, that the state, by force of the recognizance, is a purchaser from *Joseph Wier*, within our statute against fraudulent conveyances; and that the true construction of that statute, since the proviso is adopted from the 27 *Eliz.* instead of 13 *Eliz.* is, that the first *bona fide* purchaser, whether from the grantor or grantee, has a good title; and also, that a like purchaser from

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the grantee is to be preferred to a creditor of the grantor. This last position is one, which requires to be established by very clear reasoning, before it can be adopted. Where creditors are the peculiar objects of the protection of a statute, which makes an act done to their injury void as against them, it seems difficult to suppose, that any subsequent occurrences can set it up again, contrary to the object and express words of the statute. Under the other statute, purchasers only are within the purview; and wherever a purchaser appears, whether from the grantor or grantee, there is a person for whose benefit the statute was designed, and can operate. In the case of creditors, those of the grantor alone are within the purview. Has the act been ever construed, to set up a fraudulent conveyance for the benefit of the *grantee's creditors?* Can it be? If not, how does a *purchaser from him* stand better? The opposing decisions cited from *Johnson's Reports*, are entitled to much consideration, and would be to much more, did they not conflict with each other. The court would certainly pay very great great respect to the latest, as the adjudication of the highest court, and weigh the reasons well, before adopting a contrary rule; and would not proceed to decide this case against those cases, without discussing those reasons, if the decision depended upon the point. But we think it does not: because, admitting the state to be a purchaser, and that such a purchaser is within the proviso, yet here the creditor of the grantor had sold, and the lessor of the plaintiff purchased at his sale, before the state purchased. The sheriff's sale under *John's* execution was in October, 1822, and the recognizance was in April, 1826.

The statute 13th *Elizabeth* being intended to protect creditors, a *bona fide* purchaser from a fraudulent vendee, has no title against the creditors of the vendor.

But the 27th *Elizabeth* being intended for the benefit of purchasers, the first *bona fide* purchaser, whether from the fraudulent vendor or vendee, is within its operation.

It is said however, that the title did not pass by the sheriff's sale, but only by his deed, which was in April, 1827, after the recognizance; and therefore that the land remained the estate, in law, of *Joseph*, and was bound by the recognizance. The effect of a sheriff's sale, and the relation of his deed to the sale, have been considered by the court, in the cases of *Davidson* v. *Frew* and *Pickett* v. *Pickett*, decided at this term, as between individuals. In the former, the plaintiff claimed under

execution against the husband, and the defendant by act of law as his widow. In the latter, the plaintiff claimed in like manner under execution against a fraudulent grantor, and the defendant was the fraudulent grantee himself. In both it was held, that the deed, operating as the execution of a power, related back to the power itself. There has been an attempt to distinguish this case from those, by saying there is no relation against the sovereign; and a string of cases cited to show, that the execution of the king is entitled to the first satisfaction, unless the debtor's goods be actually sold under the subject's process, before the sovereign's is delivered. The court is not disposed to contest that, nor to lay the public here, under greater disadvantage, than is imposed on the interest of the community represented by the crown, in England. But the question in this case is altogether different. The cases relied on, are those of *the same debtor* to the crown and the subject; and *no sale* by the latter, before the former sues execution. Both circumstances must concur, to give operation to the prerogative. The cases of *Rex* v. *Wells* (16 *East* 278) and *Rex* v. *Sloper* (6 *Price* 114) so lay down the rule. If the subject hath sold the goods of the king's debtor, before the sovereign sues execution, the sale is not disturbed. It is no longer a question of preference of satisfaction; for the goods have ceased to be the debtor's for any purpose. But here the question is not one of relation, on which depends the right of prior satisfaction. But the question is, whose lands were these when the lien of the recognizance was created. If both parties claimed the lands under *Joseph Wier*, then the reasoning might apply. And it would then have to be determined, whether the sale by an individual of land, for which no sheriff's deed was executed, would defeat, by a subsequent execution of the deed, the lien of an intermediate recognizance. Upon that, we will be ready to give an opinion when it arises; for there seems not much difficulty in it. But in our case, the parties claim under different creditors, against *different debtors*. And to that case, the doctrine of the prerogative does not extend. It is not a

A sheriff's deed is nothing but the execution of a power, and relates back to the power itself.

There is no relation against the state, between executions in its favor and that of a subject. The first has a preference, unless the debtor's goods have been actually sold under the process of the subject, beforethat of the state is delivered.

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question of priority; but simply one, for the creditors of which of two debtors is the land a fund. When the lessor of the plaintiff bought, his purchase was a good one, since the land was the father's for the purposes of his creditors. His deed, as to all persons claiming under the father, relates to the sale. A stranger claiming under *Joseph* subsequently, has no interest in the question of its relation. The doctrine of relation does not concern him. He can only show, that the lands remained *Joseph's*, to pay his debts. And in that respect, the state and an individual stand on the same footing.

It will be perceived, that the recognizance has been treated as creating a lien; and that such lien continues, notwithstanding the process of *fi. fa.* on it. The court is not obliged, in this case, to decide the effect of suing that execution; but as the point was made, and it is of consequence that no doubt should be felt on it, the court feels it a duty to express a prompt opinion upon it. The specific lien of a recognizance is not lost by suing a *fi. fa.* notwithstanding the case of *Jones* v. *Edmunds* (3 *Murp.* 45) rules it so, as to judgments generally. The security of the public, and the ease of persons demanding to be let to bail, require it. There has been no *extent* sued in this state within memory; indeed none heard of; and without giving this effect to the ordinary process of execution, a recognizance would afford the state no assurance of the appearance of criminals. *Burton* v. *Murphey* (2 *Murp.* 339) is in point; and that case is founded on the previous one of the *State* v. *Magniss*, in 1794, (1 *Hay.* 99) which recognizes the rule as so understood, and generally received at that time; and is the stronger, because referring to what was said on the same subject, in the argument of *Bell* v. *Hill* (1 *Hay.* 87).

No notice is taken of the title set up under *Wilson's* executions; because the title of the plaintiff is plain under *John Wier's*, and the facts do not very clearly appear. The sale under *Fulenwider's* is certainly bad; because they were against *Joseph* himself, and posterior to his recognizance.

PER CURIAM.—JUDGMENT REVERSED.

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JOHN FORT *et al.* *v.* MARTHA FORT.

Where one gave direction for drafting a will, both of real and personal estate, and upon receiving the draft, was informed that, in its present shape, it was good only as to personalty, and did no act declaring it to be his will, but merely kept it with his valuable papers, it was held not to be a valid will of personalty.

This was an issue of *devisavit vel non*, as to the will of one *Ricks Fort*.

On the 1st of July, 1828, the supposed testator applied to his counsel, *Mr. Whitaker*, to have his will drafted, expressed great anxiety to die testate, declared that he should not live long, and gave particular directions as to the disposition of his property. At the same time, he handed *Mr. Whitaker* a paper, which had been executed by him as a will in the year 1823, as a part of his instructions for drafting the proposed will. On the 30th of the same month, *Mr. Whitaker* returned the will of 1823 to *Fort*, and at the same time gave him the will now offered for probate, which was the draft of a perfect will, with a clause of attestation. *Mr. Whitaker* informed the supposed testator, that the will had been drafted according to his instructions—that in the situation in which it then was, without signature or attestation, it was a good will of personalty—but that to make it a good will of land, it ought either to be copied entirely in his own handwriting, or signed in its then state, and have the execution attested by two witnesses. *Mr. Whitaker* also informed him, that the will of 1823 had been revoked, by his, *Fort's* subsequent marriage, and the birth of a child. At *Fort's* request, these instructions were repeated several times.

About fifteen days after this conversation, the supposed testator was taken suddenly ill, and continued in a state of delirium until his death, which took place on the 25th of August following, when the will, now offered for probate, was found wrapped up in that of 1823, placed among his valuable papers, and in all respects in the same state in which they were, when received from *Mr. Whitaker*.

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Upon these facts, as a case agreed, it was submitted to the court, which of the papers above mentioned was the will of the supposed testator, or whether he died intestate.

His Honor Judge NORWOOD pronounced for the will of 1828, as a will of personalty, and the caveators appealed.

It did not appear that the will of 1823 had ever been offered for probate.

Badger, for the appellants, contended, that if a testator makes a will of both real and personal estate, and it is, in the opinion of the testator, incomplete, it is not good as to either kind of estate—and he relied upon the clause of attestation, as conclusive, that in the opinion of the testator, something more was to be done; and cited *Walker* v. *Walker* (1 *Mer.* 503).

Devereux, on the other side, relied upon the circumstances of the case; and contended, that where there was a well ascertained intention of dying testate, and the due and formal execution of a will was prevented by the act of God, or by inevitable accident, an incomplete paper should be pronounced for; and cited *Scott* v. *Rhodes* (1 *Phillimore* 15) *Read* v. *Phillips* (2 *do.* 207) *Harris* v. *Mandock* (*do* 224) *Thomas* v. *Wall* (3 *do.* 356) *Wood* v. *Wood* (1 *do.* 101) and *Mason* v. *Lembury* (8 *Vin. Ab. Devise, p.* 139, *pl.* 17).

RUFFIN, Judge.—The only question now before the court is, whether the paper written by *Mr. Whitaker* is the will of *Ricks Fort*, deceased, as to his personal estate. The question upon the paper dated in 1823 cannot arise, until that paper be offered for probate. The court declines giving an extrajudicial opinion upon it.

A point of very general consequence has been taken upon the paper now under consideration. Against that, as a will of personalty, it is objected, that were it otherwise good for that purpose, yet as it purports to pass real as well as personal property, and something more was necessary to complete it as to lands, which the sup-

posed testator knew, and intended to add, it is incomplete for any purpose. This position is one of very extensive bearing, and deserves very deliberate consideration, before it is either adopted or rejected by the court. I do not understand it to be carried to the extent, that a will, disposing, or affecting to dispose of realty and personalty, must be good as to both or neither; for example, a paper with one witness. Much of the argument however, in support of the one position, is equally applicable to the other. For it is said, that where a father, for instance, by his will provides for one child out of his personal property, and for another with land, he cannot intend to die testate as to one without the other; to mean that one fund shall be disposed of in that manner, unless the other is also; because it is doing injustice among his children. Now this argument is as strong, when the will is incomplete only in point of law, as where it is incomplete within the purpose of the maker —that is, where it is not what he intends it shall be in point of formal execution, for the sake of making it good for all purposes. Yet a will attested by one witness, is certainly good to pass chattels, and certainly not good to pass the lands mentioned in it. This may however be upon the ground, that in the last case it is defective only by reason of a positive statute; and in the former upon the intention, or rather the want of intention in the party to make it a will for one purpose, unless it be for all.

And upon this ground, it is contended here, that it is not a will at all, because for the purpose of passing the real estate, the signature of the supposed testator, and attestation of two witnesses were necessary, and were intended. The case of *Walker* v. *Walker* (1 *Mer.* 503) has been cited insupport of the argument. The counsel in that case presented it in a clear and very strong light; and their reasoning is directly applicable to the case now under consideration. The decision was against the will. Unfortunately the court gave no reasons; so that we cannot tell whether they adopted the argument of the counsel, or carried it out to the length contended for. The case itself did not make it necessary. It did

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not rest barely upon the facts, that the paper had a clause of attestation, and no subscription of witnesses. There was this additional one: the will was found in the testatrix' drawer, after her death, in an envelope, on which she had herself written: "I have signed and sealed my will, to have it ready to be witnessed the first opportunity I can get proper persons;" and she lived twelve years after the will bore date. This showed that she knew there ought to be witnesses; that she intended to get them, when she wrote the will, and the memorandum on the envelope; and so that she did not intend her signing as a full execution for any purpose: and from her not having it attested for so long a period, a strong presumption arose that she had abandoned it altogether. The case may have turned on these circumstances. It is certainly not an authority direct to the point, that the want of attestation, where there is a clause of attestation, will defeat a will altogether. And it is too important a principle, to be determined in any case which does not require it.

Does the want of attestation, where there is a clause of attestation, defeat a will altogether? *Qu.*

The court does not think this case turns on it. There is not the least evidence that the deceased published, or otherwise treated *the particular paper* delivered to him by *Mr. Whitaker*, as his will. He did not read it, nor have it read, nor otherwise express himself concerning the contents. When he was told, that in the shape in which it then was, it would not pass lands, but would personalty, he said not a word towards publishing it, as a will of the latter sort; on the contrary, he anxiously sought instructions of the requisites to make it good as a will of lands. Can it be doubted, that he did not mean to publish it, until he could do so in a way to make it effectual for all its purposes. He took it home, and did not even sign it, as he probably would have done, had he read it, and been satisfied. But it is said, that by putting it away with the old will, he seems to have regarded it as a valuable paper, and so recognized it as his will. Not so; he doubtless recognized it as a paper, which might be his will; which probably he intended to execute as his will; but not as his executed will. The preservation and custody of the old will being the

same, the argument is much stronger in favor of a republication of that, which is stated to have been duly executed to pass lands; and is signed by him, and must also have been written by him. For if the last paper was considered by him his will, why keep the former?

Without deciding any general question, this case may well be disposed of upon its particular circumstances. Altho' the deceased wished to make a will, there is no evidence of a publication of this particular paper as his will. He did not expressly say so at *Whitaker's*. It is not to be taken by inference, when it appears the party did not know the contents of the paper, altho' he was told that in the state in which it then was, it would be good for personalty. It may be presumed, that he read it when he got home; but there is no evidence that he was satisfied with it, except that he preserved it. He never spoke of it, as he naturally would, if he had considered it a will. And the preservation of both papers together, is rather evidence of the republication of the first, than a publication of the last in its incomplete state.

PER CURIAM.—JUDGMENT REVERSED.

PETER DOWELL v. JOEL VANNOY.

Where a sheriff executes a writ, and permits the defendant to go at large, under a promise to give bail to a deputy; the latter is not liable to the sheriff for an escape of the defendant.

ASSUMPSIT, and upon the general issue, the case was, that the plaintiff was sheriff of Wilkes, and received a writ at the instance of one *Gill*, against one *Shackelford*, returnable to Iredell Superior Court—that the plaintiff arrested *Shackelford*, and permitted him to go in search of bail; informing him that the writ would be left in the hands of the defendant, who was deputy sheriff, and to whom he, *Shackelford*, might give bail—and the plaintiff directed the defendant to return the writ and bail bond to Iredell Superior Court. *Shackelford* absconded

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without giving bail, and the plaintiff was fixed by *Gill* as special bail, and brought this suit upon the implied promise of the defendant faithfully to perform his duty as deputy sheriff, and indemnify him against the consequences of his acts or omissions.

His Honor Judge DANIEL charged the jury. that as the plaintiff gave *Shackelford* permission to look for bail, and bring the bail when procured to the defendant to be bound, the deputy was not liable in this action, unless he had orders to re-take *Shackelford*, in case bail was not given, before the return day of the writ.

A verdict was returned for the defendant, and the plaintiff appealed.

The case was submitted without argument, by *Badger* for the plaintiff, and *Gaston*, for the defendant.

HALL, Judge, after stating the case as above, proceeded: I think it is only necessary to read the statement, to discover, that whatever error was committed in the case, was the error of the plaintiff himself. He indulged *Shackelford*, and not the defendant. The latter only acted in conformity to his instructions. There is certainly no ground upon which a new trial should be granted.

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN H. SWAIM *v.* ASHLEY SWAIM.

A right of action is not destroyed by an agreement, which only gives the plaintiff another action of the same kind. *Hence*, a parol agreement to refer a claim to arbitration, is no bar to an action upon the original claim.

ASSUMPSIT for money had and received by the defendant, to the use of the plaintiff, tried on the fall circuit of 1830, before his Honor Judge STRANGE.

Upon *non assumpsit* pleaded, the case was, that the defendant had sold the plaintiff a tract of land, and had executed a bond to make a title at a future period. The

plaintiff gave his promissory note to secure the purchase money, and made some partial payments. Afterwards it was discovered that the defendant had no title to the land, and it was agreed that the bond of the defendant, as well as the note of the plaintiff, should be cancelled, and that arbitrators should determine, whether the defendant should return to the plaintiff the money, which the latter had paid upon the note. His Honor thinking, that, upon these facts, the plaintiff was not entitled to a verdict, directed a nonsuit to be entered.

Winston, for the plaintiff, was stopped by the court.

Badger, for the defendant, declined arguing the case.

RUFFIN, Judge.—If money be paid on a special agreement, which is not performed, and cannot be, the party paying, may either sue on the contract; or in disaffirmance of it, he may bring *assumpsit* for money had and received to his use. The plaintiff then could have recovered in this action, when the defendant failed to convey the land. Has any thing since occurred to prevent him? The new agreement to refer the matter to arbitration, we think, does not. It was only a mode stipulated between the parties, to ascertain the amount of the plaintiff's demand, without going to law. It did not extinguish the plaintiff's original right. That was still recognized as existing. If there had actually been an agreement on the part of the defendant, to give a certain thing in satisfaction, it would not have barred the plaintiff, unless the thing agreed on had been delivered and accepted. An accord, without a satisfaction, is nothing. The plaintiff's action is not destroyed by an agreement, which merely gives him another action of the same kind for the same demand.

PER CURIAM.—JUDGMENT REVERSED.

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DEN *ex dem.* of CHRISTIAN ROBERTS *v.* SAMUEL FORSYTHE *et al.*

The word *heirs* is absolutely necessary in a grant, to create a fee, as well in a deed at common law, as in one operating under the statute of uses.

EJECTMENT, tried before his Honor Judge STRANGE, on the fall circuit of 1830.

On the trial, the lessor of the plaintiff claimed title under a deed from one *James Veazey* to one *William Jones*, and by other mesne conveyances to himself. The defendant proved that *William Jones* was dead, and objected, that the deed from *Veazey* to him created only an estate for the life of the vendee. This deed was in the usual form to the *habendum*, when it proceeded as follows: "to have and to hold the aforesaid land and pre-"mises, with all houses, orchards, &c. and all other "and singular the improvements thereon, therein or "thereunto belonging, or in any wise appertaining to "the said land and premises, and he the said *J. V.* doth "hereby warrant and defend the said land from himself, "his heirs, executors, administrators and assigns, and "from all other persons lawfully claiming the said land, "to him the said *W. J.* his heirs and assigns forever."

A verdict was taken, subject to the opinion of the court upon the above mentioned objection, and judgment having been rendered for the plaintiff, the defendant appealed.

Devereux, for the defendant.

Badger & W. H. Haywood, *contra*.

HALL, Judge.—It is a position disputed by no one, that if it is intended to create a fee in the grantee, either by conveyance at common law, or under the statute of uses, the conveyance must be made to the grantee and his *heirs*. If it be to the grantee, without superadding the word *heirs*, only a life estate passes. That appears to be the case in the deed from *Veazey*. The words *heirs of the grantee*, are used in no part of the deed, ex-

cept in the clause of warranty, or the clause for covenant of warranty. If it is considered as a warranty, altho' the warranty is made to the grantee and *his heirs*, it cannot enlarge the estate before granted. (*Seymour's case*, 10 *Rep*, 97). If it is considered as a clause for quiet enjoyment, there are no words in it importing a grant or transfer of any thing, but only a guarantee of what has been granted. Nor can the difficulty be avoided, by any fair transposition of the words or sentences in the deed. The meaning of the grantor cannot be better collected from the deed than by reading it naturally. It is very probable that he intended to convey the fee, but that intention cannot be collected from the deed.

A life estate is not enlarged into a fee, either by a warranty in fee, or by a covenant for quiet enjoyment to the grantee and his heirs.

PER CURIAM.—JUDGMENT REVERSED.

JEREMIAH WINTZ *adm'r. of* JOHN WINTZ v. ROBERT WEBB.

The *sci. fa.* given by the act of 1806 (*Rev.* c. 700) to secure creditors against fraudulent conveyances by debtors, is dependent upon the original action of the creditor, and to sustain it, the first judgment must be in force.

This was a SCIRE FACIAS under the act of 1806 (*Rev.* c. 700) whereby it was suggested, "that *Joseph Wier*, "against whom *John Wintz*, deceased, had, in his life-"time, obtained a judgment for, &c. hath no visible "property on which an execution can be levied, to sa-"tisfy the same, and that he (the plaintiff) hath good "reason to believe that the said *Joseph Wier* hath frau-"dulently conveyed his property to a certain *Robert* "*Webb* (the defendant) to avoid the payment of his just "debts, and that the said *Robert Webb* conceals the same, "or procures the same to be concealed, so that it cannot "be levied on, to satisfy the said judgment." The writ "then commanded "*Robert Webb* to be and appear, "&c, to show cause, why execution shall not issue against "such property so concealed in his hands, to satisfy the "judgment aforesaid."

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DEN *ex dem.* of CHRISTIAN ROBERTS *v.* SAMUEL FORSYTHE *et al.*

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A verdict was taken, subject to the opinion of the court upon the above mentioned objection, and judgment having been rendered for the plaintiff, the defendant appealed.

Devereux, for the defendant.

Badger & W. H. Haywood, *contra*.

HALL, Judge.—It is a position disputed by no one, that if it is intended to create a fee in the grantee, either by conveyance at common law, or under the statute of uses, the conveyance must be made to the grantee and his *heirs*. If it be to the grantee, without superadding the word *heirs*, only a life estate passes. That appears to be the case in the deed from *Veazey*. The words *heirs of the grantee*, are used in no part of the deed, ex-

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A life estate is not enlarged into a fee, either by a warranty in fee, or by a covenant for quiet enjoyment to the grantee and his heirs.

PER CURIAM.—JUDGMENT REVERSED.

JEREMIAH WINTZ *adm'r. of* JOHN WINTZ *v.* ROBERT WEBB.

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This was a SCIRE FACIAS under the act of 1806 (*Rev.* c. 700) whereby it was suggested, "that *Joseph Wier*, "against whom *John Wintz*, deceased, had, in his life-"time, obtained a judgment for, &c. hath no visible "property on which an execution can be levied, to sa-"tisfy the same, and that he (the plaintiff) hath good "reason to believe that the said *Joseph Wier* hath fraudulently conveyed his property to a certain *Robert* "*Webb* (the defendant) to avoid the payment of his just "debts, and that the said *Robert Webb* conceals the same, "or procures the same to be concealed, so that it cannot "be levied on, to satisfy the said judgment." The writ "then commanded "*Robert Webb* to be and appear, "&c, to show cause, why execution shall not issue against "such property so concealed in his hands, to satisfy the "judgment aforesaid."

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The defendant denied, upon affidavit, having any of the goods or estate of *Joseph Wier* in his possession, under any conveyance made by the latter to defraud his creditors. Issue was taken by the plaintiff, and the jury, under the charge of his Honor Judge MANGUM, found, "that the defendant did claim title to, and did hold and "secrete the property of *Joseph Wier*, and held and used "it to avoid or delay the payment of the just debts of "the said *Joseph*, which said property was of the value "of $900." Whereupon judgment was entered in favor of the plaintiff, for the amount of his original debt and costs; and the defendant appealed. Many points were made on the trial below, which it is unnecessary to notice. The case stated, that pending the *scire facias*, *Joseph Wier* was executed for a capital felony, (*vide ante*, 1 *vol. p.* 363) and that no administration had been taken on his estate.

No counsel appeared for the defendant, and the case was submitted without argument, by *Winston*, for the plaintiff.

RUFFIN, Judge.—No error, to the prejudice of the appellant, is perceived in the opinions of the judge of the Superior Court, either upon the questions of evidence, or the instructions to the jury. Were there nothing more in the case, the judgment would therefore be affirmed. But the case states other facts, which the court deems fatal to this proceeding.

It is a *scire facias* under the act of 1806 (*Rev. c.* 700) That, in its nature, is not an original, but a derivative writ, dependent upon the continuing existence and obligation of the record, to enforce which it issues. This statute, when giving it in the cases provided for in it, does not change or pervert its uses. The act declares, that upon the plaintiff's affidavit, that the defendant hath no visible property to satisfy his judgment, and suggesting that he hath fraudulently conveyed it, to avoid or delay the payment of his just debts, or that some other person is in possession of the property, and con

ceals it, the court, in which the judgment was rendered, may upon such judgment issue a *sci fa.* to such person. If it be acknowledged or found, that property is held or claimed by such person, "*the court shall and may order, "the same to be delivered up, or made subject to the judg- "ment of the plaintiff.*" If the effects be money, or have been used, wasted or destroyed; then there is to be "*judgment for the plaintiff against such party*" for the amount or value, to be ascertained by a jury.

To warrant the *sci. fa.* it seems certain, that the first judgment must be in existence, and in full force. The *sci. fa.* is to be issued "*upon* any judgment." But what renders it clear is, that in case the property be specific, and remaining in specie, there is to be no judgment for the debt, nor for the value of the property, but that it be delivered up, and made subject to the judgment. The judgment must then be in a state to warrant execution on it; for without that, the property cannot be made subject to it. Here, the case states, that *Wier*, the original defendant, died in May, 1828, pending this suit upon *scire facias*, and that no administration hath ever been taken on his estate. And *Wintz*, the original plaintiff, was also dead, and his administrator had not revived the judgment. The judgment was therefore dormant, when this case was tried below. No order for the delivery of the property could be effectual; and therefore no such order could be properly made. It is analogous to the death of the defendant in original attachment, after a collateral issue joined between the plaintiff and garnishee. Both proceedings are dependent upon those original ones, out of which they have grown. The death of the party, or any other matter, which is destructive to the principal suit, arrests the progress of that which is incident.

Matter which abates an original suit, abates one that is collateral to it—as an interplea between the plaintiff and a garnishee is abated by the death of the defendant in the attachment.

If this were not so in a case where the suggestion was, that the party had the defendant's money, or had used, wasted, or destroyed his goods, it nevertheless must be so in this case. The affidavit and *sci. fa.* here make no such suggestion; but are restricted to a fraudulent *conveyance of the property* to *Webb*, and a *concealment* by

In a *sci. fa.* under the act of 1806, suggesting a fraudulent conveyance, & concealment of the property, & not that it has been wasted or used, upon a verdict

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him; and the jury find, that he held *or* used *Wier's* property (without saying what in particular) to the value of $900. There was therefore no authority to give judgment against *Webb*, personally; but only the first judgment prescribed in the act. An absolute judgment against *Webb* for the plaintiff's debt was given; which, for this reason, was erroneous, even if the judgment against *Wier* had then remained in full force. But after the death of both the parties to the original suit, no further step could be taken, until that was revived by the administrator of the original plaintiff against the administrator of the original defendant. This proceeding is subsidiary to the first judgment, and died with it. The whole had abated.

for the plaintiff, a personal judgment against the defendant is erroneous.

PER CURIAM.—JUDGMENT REVERSED.

ASHMAN F. COLLIER v. SAMUEL NEVILL *et al.*

A bond, which is valid between the obligor and obligee, is also valid in the hands of an assignee, who has discounted it at a higher rate than the legal rate of interest; and the latter may recover the full amount of the bond of the obligor, notwithstanding he claims thro' an usurious indorsement.

DEBT upon a single bond, executed by the defendants to *James Mitchell* and *Alexander Cheek*, and by them assigned to the plaintiff.

Plea—the statute of 1741 (*Rev.* c. 28) "for restraining the taking of excessive usury." On the trial before his Honor Judge SWAIN, at Orange, on the last spring circuit, a verdict was entered for the plaintiff, subject to the opinion of the court, upon the following case: The defendants executed the bond on which the action was brought, upon a *bona fide* consideration, moving from *Mitchell* and *Cheek* to them. Afterwards, the obligees, *Mitchell* and *Cheek* sold the bond to the plaintiff, at a greater discount than six *per cent. per annum*, and by their indorsement, bound themselves for its full amount.

His Honor, upon this case, set the verdict aside, and entered a nonsuit, and the plaintiff appealed.

Badger, for the plaintiff, cited the note to the cases of *Jones* v. *Davison* (3 *E. C. L.* 92) and *Munn* v. *The Commission Company* (15 *John.* 44).

Winston, for the defendants, cited *Ruffin* v. *Armstrong* (2 *Hawks* 411) *Pratt* v. *Willie* (1 *Esp. R.* 40) *Rich* v. *Topping* (*do.* 176) *Davis* v. *Hardacre* (2 *Camp.* 375) *The same* v. *Mill* (*do.* 553) *Solarte* v. *Melville* (17 *E. C. L.* 238) *Auriol* v. *Thomas* (2 *Term R.* 52) *Parr* v. *Eliason* (1 *East* 92) *Lawes* v. *Mazzaredo* (2 *E. C. L.* 438) *Daniel* v. *Carlony* (1 *Esp. R.* 274) *Marsh* v. *Martindale* (3 *B. & P.* 154) *Roberts* v. *Trenayne* (*Cro. Ja.* 507) *Mason* v. *Abdy* (*Comb.* 125) *Bedingfield* v. *Ashley* (*Cro. Eliz.* 741) *Clayton's case* (5 *Rep.* 70) *Chesterfield* v. *Jansen* (2 *Ves.* 125) *Strong* v. *Tompkins* (8 *John.* 98).

RUFFIN, Judge—The court does not entertain a doubt, that the transaction between the plaintiff and *Mitchell* and *Cheek* is usurious. The discounting of a bill or bond, and taking the general endorsement of the holder, does *ex vi termini* constitute a loan; and if the rate of discount exceed that fixed by the statute, it is an usurious loan. It is said, *non constat*, that these parties knew that the endorsers were bound thereby; without which there was no corruption. It is to be taken, they knew it; and that the indorsement expresses their contract, until the contrary, as a mistake in the writing, or the like, be shown. If a person misconstrues the statute or the law, he must abide by his error. If he mistakes the fact, as the amount reserved, he may show it. But here, there was no attempt to show even a misapprehension of the liability created by the endorsement.

A mistake in the construction of the statute of usury, if it results in taking more than the legal rate of interest, will render the contract usurious. But an error in *fact*, by which more than the legal rate is reserved, will not vitiate.

Taking the indorsement to be usurious, another question arises, namely, whether the defendants can avail themselves of it. The court does not disguise, that upon this question very serious difficulties exist, and that notwithstanding the authorities cited, doubts not at all light, are yet entertained. But upon the strength of the autho-

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rities, and the opinion heretofore generally received by the country at large, and the profession, the court feels constrained to decide, that the defendants cannot avail themselves of any intermediate illegality. The bond was available between the obligor and obligees. The former is not privy to the usurious agreement between the latter and the present holder. If the security be in its origin usurious, it is void, into whose hands soever it gets, by the words of the statute. If it be good in its origin, a subsequent usurious agreement between the same parties, does not avoid it, though it may subject the one party to the penalty, if any thing be received under the corrupt agreement. And if it be good in its origin, the subsequent transfer of it, usuriously, does not affect it as against the maker. No redress can be had on the endorsement as between the parties to it. The very object of the statute is, to protect the borrower, as an oppressed man. But there is no oppression on the obligor who is a true debtor. The law was not introduced for his protection. It is for the interest of the party injured, and the advancement of justice, that the transfer should be held valid; because where the assignee receives the money, the borrower can recover from him the excess above the principal advanced, and legal interest. But unless the obligor be obliged to pay, the endorser may be without remedy, without first paying to the endorsee the principal borrowed and interest. At least, it has been so decided. (*Fitzroy* v. *Gwillim* 1 *T. R.* 153). However, general reasoning on the subject, it is admitted, is not entirely satisfactory either way. And the court would feel much hesitation in coming to a conclusion, were there not adjudged cases in point. *Mann* v. *The Commission Company* (15 *John.* 44) is direct. The decision is, that a note valid between the maker and payee, so that the latter could maintain an action on it, is also valid, as against the maker, in the hands of an endorsee, who has discounted it at a higher rate than is legal, and the endorsee himself may recover the whole amount from the maker. This goes the full length of the present case. So also does

If a security be usurious in its creation, it is void in the hands of on innocent holder.

But if valid in its inception, a subsequent usurious agreement does not avoid it.

The object of the statute against usury is to protect the borrower, not to enable a real debtor to avoid the payment of a true debt; and hence the latter cannot aver an usurious assignment, so as to defeat the assignee.

the case of *Bush* v. *Livingston et al.* (2 *Caines' Cas. in Er.* 66) which is very strong, inasmuch as the indorser himself was a party. It was a bill for foreclosure by the assignee of a mortgage against the mortgagor, to which, of course, the mortgagee was made a defendant. The mortgagor relied, in his answer, upon the usury committed by the plaintiff in getting his assignment. It was held, that it did not lie with him, and that his obligation to make payment of the original debt was not impugned by it.

A great number of cases were cited from the English books on the part of the defendant. But they are all *nisi prius* cases, except that of *Parr* v. *Eliason* (1 *East* 92) and are subject to this observation, that none of them state the facts in such a way as to show whether the security was an *accommodation* bill or note, and intended originally to be usuriously discounted, or real paper usuriously discounted for the payee. *Lawes* v. *Mazzaredo* (2 *E. C. L.* 438) is an exception; for in that, the plaintiff was a remote and *bona fide* endorsee, and the usury was committed in discounting for an intermediate endorser. But that case is contradicted by *Parr* v. *Eliason*, in the King's Bench. It is true, this last case was also one of a remote, *bona fide* holder; and *Lord Kenyon*, as he is made to express himself, relies much on that. But it seems to me, that gives up the question. For however honest the holder is, he must claim thro' the usurious endorsement; and it is a rule in relation to contracts void by statute, that they must remain void to all intents and purposes. If the usurious endorsee could not recover against the maker, by reason of his title being void, he cannot transfer a power of recovery to another. The right of the latter can only be sustained upon the ground, that the consideration upon which the holder transferred his note, valid in the holder's hands, is collateral to him, the maker; altogether independent of his contract, and not affecting it. And this presses upon the court, the consideration of the futility of the rule, contended for on the part of the defendants. For it is worth nothing, if it and the statute can be evaded by an

A distinction exists between the usurious discount of accommodation notes, and notes which are perfect, and on which an action can be maintained. In the first case, the discount is a loan to the maker, and the note is void under the statute. In the second, it is the purchase of an existing valid security, and the endorsee may recover on it.

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endorsement for value to an innocent party. And again a suit in the maker's name, would set up the obligation purged of the usury.

This case is altogether different from that of *Ruffin* v. *Armstrong* (2 *Hawks* 411) which was a suit against the endorser, upon the usurious endorsement itself; and the court purposely avoided going out of that question, tho' the whole doctrine had been discussed at the bar.

The case of *Ruffin* v. *Armstrong*, 2 *Hawks* 411, approved by RUFFIN, Judge.

Without interfering therefore with the rights and liabilities of the endorser and endorsee, as between themselves, it appears to us, that these defendants cannot allege this usury, in discharge of themselves. They are like persons who have received money to the use of another, on an illegal contract. They are not allowed to retain it, but must pay it to him for whose use it was received. (*Tenant* v. *Elliott* 1 *B.* & *P.* 3. *Farmer* v. *Russell do.* 296.)

PER CURIAM.—JUDGMENT REVERSED.

SAMUEL SIMPSON v. JAMES S. BLOUNT.

Where evidence proper for one purpose was, by the counsel who introduced it, urged to the jury as proof of a fact to which it is incompetent, and the counsel on the other side replied to this argument, but moved for no specific instructions on this head from the bench, *it was held*, that the judge committed no error in not noticing it in his charge.

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TRESPASS QUARE CLAUSUM FREGIT, tried on the fall circuit of 1829, at Beaufort, before his Honor Judge DONNELL.

The plaintiff claimed under a grant issued in 1770, and deduced a regular title from the grantee to himself. He then, upon the point of possession, proved that the *locus in quo* was a swamp, entirely uncultivated, and that in the years 1774, 1814 and 1822, three several persons had, under a licence from him, cut timber on the land.

The defendant claimed under a grant dated in the year 1743, to one *Samuel Boatwell*, and one question in the

cause was, whether this grant covered the *locus in quo*. Upon this point the defendant offered a deed, dated in 1748, whereby *Samuel Boatwell* conveyed to one *Godley*, a tract of land patented by *Edward Salter*, and calling for the lines of *Samuel Boatwell*, senior, and *Samuel Boatwell*, junior, as two of its boundaries. The plaintiff objected to this deed, as not being evidence in relation to the boundaries of *Boatwell's* grant of 1743. But the defendant insisting that it was one of the mesne conveyances under which he claimed, his Honor permitted it to be read. It was in proof, that there were two *Samuel Boatwells*, who had been long dead, but no evidence was given as to which of them was the vendor in that deed.

The plaintiff examined one *Cherry*, a surveyor, who had surveyed the adjacent lands about twenty years before, in consequence of a suit then pending between him and one *Bryan Blount*, who testified to the beginning corner upon the plat made under a survey ordered in this cause. He also offered to the jury the plat made by the witness in the suit with *Bryan Blount*. This testimony was objected to by the defendant, and rejected by the presiding judge.

In addressing the jury upon the question of boundary, the defendant's counsel adverted to the fact, that the deed of *Boatwell* to *Godley* called for the lines of *Samuel Boatwell*, junior. The plaintiff's counsel, in his reply, insisted, that the calls of this deed were not evidence on the question of boundary—contending that the vendor was the same *Samuel Boatwell*, to whom the grant of 1743 issued; and in urging that the deed was not evidence as to the question of boundary, he stated that he affirmed this under the correction of the court. Upon this observation of the counsel no remark was made by the judge.

His Honor charged the jury, that if the plaintiff had title to the *locus in quo*, that title gave him a constructive possession, which was sufficient to enable him to sustain this action; but that if they believed the defendant had succeeded in showing that the plaintiff had no

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title, but that the title was in another, although the defendant could not deduce it to himself, that then, in order to entitle himself to recover, the plaintiff ought to show an actual possession; and that his having, at the times above mentioned, permitted others to cut timber on the land, was not evidence from which they could infer an actual possession. Nothing was said to the jury respecting the deed of *Boatwell*; neither was his Honor requested to instruct them upon any particular point.

A verdict was returned for the defendant, and the plaintiff appealed.

The case was argued by *Gaston*, for the plaintiff, and *Hogg*, for the defendant.

RUFFIN, Judge.—The plat made by *Cherry* was not evidence at all. If it was necessary and competent to prove the beginning of the line run by him, that had been done by the witness himself, and the point designated, in his testimony to the jury, on the plat then before them, and made in this cause. The only purpose, for which admission of the other plat was sought, must have been to mislead the jury, by letting them see how *Cherry* ran the line from that beginning, in the hope that they would regard that as the true line. This conclusion they could not properly draw, either from the fact that *Cherry* had run it, or that one of the parties, for whom he was then surveying, had insisted on it as the line.

A plat, made on an order of survey in one cause, is not evidence on the trial of another between different parties.

The instruction upon the point of possession was also correct. I do not accord with the counsel for the defendant, that in the absence of title, actual possession, that is, by residence, or inclosure and cultivation, must be shown, to support trespass. The argument is, that tho' swamp, the land is susceptible of draining and cultivation; and nothing short of that should be taken to be a possession, when, from the nature of the subject, *that can* be done. I think the rule is, that exercising that dominion over the thing, and taking that use and profit, which it is capable of yielding *in its present state*, is a possession. It is all that can be done, until the subject itself shall be changed. It is like the case stated in the books,

Actual possession of land consists in exercising that dominion over it, and making that profit from it, of which it is susceptible in its natural situation.

of cutting rushes from marsh. This is sufficient, tho' it might appear that dikes and banks would make the marsh arable. But acts of this description must partake of the character of ownership, and of a continued assertion of right and exercise of it. Occasional acts, with long intervals between them, do not denote title, nor the claim of dominion; at least, they are very ambiguous evidences, and may as well be taken for the wrongs of a trespasser, as the assertion of a rightful dominion. Here, there has been a cutting of timber on three occasions only in sixty years—since 1770; and the last time was seven or eight years before this suit. They create neither a presumption of title, nor present possession.

But these acts must be characteristic of ownership. If at long intervals, and consistent with the acts of a trespasser, they are not sufficient.

Without entering into the inquiry, whether the deed from *Boatwell* was, under the circumstances, evidence of boundary, the court thinks the judge below committed no error touching it. When offered for that purpose, it was not admitted by the court. When offered as a link in the chain of title, it was properly received. It was uncandid in the counsel, when he failed to make out a title, to draw it to the aid of his cause upon another point, to which the court had held it not to be evidence. The court might properly have stopped him, and reprehended the unrespectful demeanor. But it is not error in law not to have done it. The opposite counsel might also have called upon the court to correct a course of argument, not founded upon legal evidence, and injurious to the side, with the care of which he was charged. If he would not move the court to interpose, but chose to rely on his own reply to the jury, he cannot complain that the judge did not, of his own accord, do it. The party must move the court, before he can impute error, in a case of this sort. The counsel did reply, and properly to the argument. The judge gave the reply his sanction; for his silence, under the circumstances, was a sanction. But if it were not, the court is not bound, in summing up to the jury, to notice every position discussed between the counsel, which would lead to most

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inconvenient prolixity. If any thing deemed material be omitted, the counsel can call the attention of the court to it, and pray an instruction. A refusal would constitute error, when an omission would not. Many cases do not require a charge from the court; and few a full one. Something must be left to the discretion and sense of propriety of the presiding judge. And at all events, it is not error for the court not to be active, when the party has not moved it.

PER CURIAM.—JUDGMENT AFFIRMED.

THOMAS SANDERSON *v.* NEHEMIAH ROGERS.

An execution is an entire thing, and must be completed by the hand which begins it. Where a *fi. fa.* was levied by one sheriff, and a *venditioni exponas* issued to his successor, it *was held*, that the latter could do no official act under the writ, and was not entitled to commissions.

ASSUMPSIT, in which the plaintiff declared for the sum of $253, due him as sheriff of the county of Washington, for commissions upon an execution, which came to his hands in favor of the defendant against one *Ely*.

The defendant pleaded the general issue, and upon the trial, before his Honor Judge DANIEL, a verdict was entered for the plaintiff, subject to the opinion of the court upon the following case.

A *fi. fa.* upon the judgment, in favor of the defendant against *Ely*, first issued to one *Garrett*, then sheriff of Washington, who levied it upon the property of *Ely*, and shortly thereafter died, having appointed an executor. Upon the death of *Garrett*, the plaintiff was appointed his successor, and a writ of *venditioni exponas* issued to him, directing him to sell the property levied upon by his predecessor. The plaintiff having this writ in his possession, demanded of *Ely* a bond for the forthcoming of the property levied on by *Garrett*. This bond *Ely* refused to give, and insisted that the writ was im-

properly issued to the plaintiff, and that the duty of collecting the money due upon the judgment, on the death of *Garrett*, devolved upon his executor. Upon the plaintiff's threatening to seize the property, *Ely* complied with the demand and gave the bond. The plaintiff neither levied the execution, nor collected the amount of it. He however advertised the property for sale, which was prevented by an injunction obtained by *Ely*, pending which, the defendant received his debt directly from *Ely*. Upon these facts, his Honor set the verdict aside, and entered a nonsuit, and the plaintiff appealed.

No counsel appeared for either party in this court.

RUFFIN, Judge.—The writ directed to the plaintiff gave him no authority to seize. Neither could it properly issue to him, to command him to sell that which had been seized by his predecessor, because that could not be done without a seizure previously made by himself. A *venditioni exponas* is predicated upon the effects being in the hands of the officer, to whom it is directed. (*Washington* v. *Sanders ante* 2 *vol.* 348). This results from the maxim, that an execution is an entire thing, and must be completed by the hand which begins it. A *fieri facias* vests a property in the sheriff who seizes, which satisfies the debt, and makes the sheriff himself liable. Hence he may sell after the return of the writ, and after he is out of office. (*Clark* v. *Withers Ld. Raym.* 1072 *S. C. Salk.* 322). And the process to the new sheriff is a *distringas*. It follows, that upon the death of the old sheriff, the property is in his executors; that they become responsible for the debt; and that they may sell the chattels. It is different indeed with a *ca. sa.* but from necessity; and no farther than necessity carries the difference. Upon the coming in of the new sheriff, the old one must deliver the prisoners, and give notice of the executions wherewith they were charged, or he remains liable. But upon his death, the new one must, at his peril, take notice, and the custody of them, because he is the keeper of the goal. and there is nobody

A levy vests a property in personals in the sheriff, to which his executor succeeds. Upon his death or resignation, a *distringas* against him, or his executor, is the proper process.

But the successor, upon the death of a sheriff must, at his peril, take notice of a prisoner in custody upon a *ca. sa.*

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except him entitled to keep them there. (*Westby's case*, 3 *Rep.* 71, 72). But the law has provided no rule for the delivery over of property in the hands of the old sheriff. We must conclude then, from the reason of the thing, that it devolves on the representatives of the deceased sheriff, who are responsible for it. And to that effect, it is pointedly laid down by *Lord Mansfield*, in *Cooper* v. *Chitty et al.* (1 *Wm. Bl. Rep.* 65).

We think, therefore, that the plaintiff is not entitled to commissions; because he did nothing, and could do nothing officially; upon which kind of acts alone his commissions arise.

There is no count on a *quantum meruit*, which would have let in evidence of a request from the defendant, and entitled the plaintiff to the worth of his actual labour. But the declaration is for commissions, as fees of office; and to them there is no right.

PER CURIAM.—JUDGMENT AFFIRMED.

WILLIAM YARBOROUGH, *adm'r of* JOHN HARRIS v. ROBERT HARRIS.

A special administrator, in an action by the general administrator, may show, that property which he received and inventoried, as belonging to the intestate, is in fact the property of a lunatic, of whom the special administrator was appointed guardian after the repeal of his letters of administration.

DETINUE, for sundry slaves, tried on the fall circuit of 1830, before his Honor Judge STRANGE. The plaintiff proved, that his intestate died possessed of the slaves in question. That after his death, upon a controversy respecting a supposed will of the intestate, administration *pendente lite* was committed to the defendant, who returned an inventory, in which the slaves were mentioned, as a part of the personal estate of the intestate. That after the supposed will had been pronounced against, the limited administration to the defendant was revoked, and general letters issued to the plaintiff, who had demanded the negroes of the defendant.

The defendant proved, that after the revocation of the letters of administration to him, he had been appointed guardian to a son of the intestate, who was of full age, but had, upon inquisition, been pronounced a lunatic—and he offered proof of a gift, by the intestate, of the slaves in dispute, to his lunatic ward. This testimony was objected to by the plaintiff, who contended that the defendant was estopped to show title to the slaves out of *John Harris*, the intestate. But his Honor holding, that although the facts above stated formed a strong *prima facie* case for the plaintiff, they did not conclude the defendant from showing the real state of the title, admitted the evidence, and the defendant obtaining a verdict, the plaintiff appealed.

Badger & W. H. Haywood, for the defendant.

Nash & Winston, for the plaintiff.

HENDERSON, Chief-Justice.—An executor or administrator is not estopped by his inventory. It affords strong evidence against him, but he is not concluded, and may show the truth. Estoppels are not to be favored; particularly those arising from the mere acts of the party, where the fact admitted requires skill and judgment to determine on; as who has title. In such cases, it is a mere conclusion of law, in which any person, and more particularly a layman, may be deceived. There is no estoppel upon a tenant or bailee, longer than the tenancy or bailment continues. If it was an estoppel, it would continue after the premises or property had been surrendered up, which was never even contended. The rule under which this case falls, if it falls under any of the kind, that a tenant or bailee, after the determination of his interest, is bound to surrender up the property, is founded on high grounds of morality and good faith, and at all times ought rigidly to be adhered to, where circumstances require its application. That the tenant should not hold for himself, or even for another, whose rights it is not his peculiar duty to guard and protect, certainly falls within the rule; nor should he seek a relation or connexion with another, the necessary of-

Estoppels which arise from the mere act of a party, and from which a conclusion of law is inferred, are not favored.

The rule, that a tenant or bailee, cannot dispute the title of his landlord or bailor, without surrendering the possession, is founded in a principle of morality which does not permit possession to be retained, in violation of the faith upon which it was acquired.

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fect of which would be to make it his duty to guard and protect that property against his landlord or bailor. It would seem as if the relation was sought with that view only. But neither policy nor morals require, that the rule should be extended to cases, where an office or authority, involving various other duties, is conferred on him by law, even with his own consent. For then the presumption is weak, that the office was sought or obtained with an intent injurious to the rights of the bailor. As in the present case, where there are so many *good* motives to which to ascribe the act, it is uncharitable to ascribe it to a bad one. If the rule was founded solely on the rights of the landlord or bailor, and not also as a punishment to the immorality of the tenant or bailee, it would put an end to the doctrine of remitter, to which this bears some analogy. I do not concur with the defendant's counsel, that the special administrator is not the bailee of the general administrator, because the general administrator was not in being, whilst he was the special administrator, for that the latter ceased before the other commenced. For in spirit he received the property, to hold during the contest, and was bound, if it belonged to the estate, absolutely to deliver it to the general administrator. Nor could he retain possession against the general administrator, under a claim for himself, or a mere stranger. But if an office is conferred on him by law, to which the title to the bailed property is attached, he may then retain possession; for this is no breach of faith; at least from a bad or selfish motive. Even if he seeks an office, such as the present, where various other duties are imposed, it shall not be presumed, that he sought it as a pretext for not restoring the property. If it is the property of his ward, he ought to have possession of it; and to retain that possession is in law no breach of faith.

But if, during possession under a bailment, the bailee is by act of law vested with an office, the duties of which require him to dispute the title of his bailor, he is remitted to the title thus acquired, and may, without a breach of faith, retain the possession.

PER CURIAM.—JUDGMENT AFFIRMED.

PETER DOWELL *qui tam*, &c. v. JOEL VANNOY.

A sheriff who had collected money upon an execution, and had neglected to pay it to the plaintiff, and was thereby subject to damages at the rate of twelve *per cent per annum*, having lent the money thus collected to a third person at the same rate of interest, was held guilty of usury, and liable to the penalty imposed by the act of 1741 (*Rev.* c. 28).

DEBT, upon the act of 1741 (*Rev.* c. 28) "for restraining the taking of excessive usury."

The writ was in the usual form, but was tested "the "second Monday of September, in the 53d year of our "Independence, A. D. 182" and by a memorandum at the foot, was stated to have issued the 12th day of September, 1828.

The defendant pleaded *nil debet*, and the act of 1808, (*Rev.* c. 748) limiting the time of bringing penal actions to three years after the cause of action had accrued.

On the trial, before his Honor Judge DANIEL, at Wilkes, on the spring circuit of 1830, the plaintiff proved, that the defendant, being sheriff of Wilkes, had an execution for $600 against the plaintiff, at the suit of one *Crissman*, returnable to the fall term 1825, of Surry Superior Court—that upon this execution the defendant had made but $400, which he sent, together with the writ, at the return day, with directions to pay it to *Crissman*, only upon condition that the latter would not amerce him for not making the whole amount of the execution. *Crissman* refused to receive the money upon these terms, and not only amerced the defendant, but took steps to subject him under the act of 1819, (*Rev.* c. 1002) to the payment of the sum actually received, together with damages at the rate of 12 *per cent per annum*. The defendant then loaned part of the money he had thus collected, to one *Thurmond*, and took from him the following bond:

"We, *M. Thurmond*, principal, &c. promise to pay "to *Joel Vannoy*, three hundred and twelve dollars, forty "cents, money lent, to be paid by March Superior "Court of Surry, 1826—the same is money collected

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"for *C. L. Crissman*. We agree to pay to *Joel Vannoy*, "the interest which he may be liable to pay for failing "to pay the above money into office at September term, "1825, of Surry court. Sept. 15, 1825."

Thurmond paid the amount of this note, together with interest at the rate of 12 *per cent per annum*, to an agent of the defendant, who immediately took the same money, together with the balance due upon the execution, to Surry court-house, and paid it to *Crissman*, with interest at the same rate on $400. At the time of this payment, the defendant was present, and then surrendered to *Thurmond* the note above set forth.

His Honor instructed the jury, that although by law the defendant was bound to pay *Crissman* interest upon the money he had collected, and failed to pay over, at the rate of 12 *per cent per annum*, yet that the law which imposed so high a rate of interest upon him, did not authorize him to exact the same of others, and that if the defendant had received more than six *per cent per annum* of *Thurmond*, they ought to find a verdict for the plaintiff. The jury found, "that the defendant does owe the "sum of $624, and that the statute of limitation does "not bar."

A rule for a new trial being discharged, and judgment rendered on the verdict, the defendant appealed.

Gaston, for the defendant, upon the rule for a new trial, contended 1st, that the defendant was only an agent between *Crissman* and *Thurmond*; 2d, that the contract between the defendant and *Thurmond*, was only a contract of indemnity, and therefore legal, and cited *Button* v. *Downham* (*Cro. Eliz.* 643).

He also moved in arrest of judgment, 1st, because the writ was not dated; 2d, because the entry of the verdict, "the statute of limitation does not bar," was not responsive to the issue, and cited *Comyn's Dig. Pleader S* 22.

Badger, for the plaintiff, on the motion for a new trial, cited *Levy* v. *Gadsby* (3 *Cranch* 180); and on the motion in arrest of judgment, urged that in a penal action the sta-

tute of limitation may be given in evidence under the plea of *nil debet*, and therefore, that there was no necessity for any response to the special plea.

RUFFIN, Judge.—It is argued for the appellant, that the court erred in two respects. The first, in not leaving it to the jury, whether the defendant was not merely the medium or instrument of *Thurmond*, to pay to *Crissman* the interest to which the latter was entitled, and so *Vannoy* did not receive it for himself. The second, that the contract is not one for usurious interest, as such, but merely for an indemnity, which is lawful; and, at all events, that the character of the transaction ought to have been left to the jury.

It seems, that an agent, who lends money at an usurious rate of interest, is liable to the penalty, notwithstanding he discloses his character.

In relation to the first, it may be observed, in passing, that it is far from clear, that an agent in lending money, upon an usurious contract, shall be excused, either by the fact of the agency, or by a disclosure of it. It is a criminal act, and upon principle, it would seem that all, who participate in it, were liable to its penalties. And altho' *Crissman* might properly exact from the defaulting sheriff the increased interest, given against him by law, he could not, under color of that right, loan the money to a third person, thro' the instrumentality of the sheriff, at such greater rate of interest.

But here, there was no such agency. No contract with *Crissman*, direct or indirect, can be inferred. He gave no assent to the loan to *Thurmond*. He did not know it: and was at the time actually pursuing *Vannoy* by suit for the money. The fact then contradicts the position assumed.

A pure contract of indemnity against a doubtful claim is not within the statute against usury.

The force of the second objection depends altogether upon the sense, in which the term *indemnity* is used; and the fallacy of the argument lies in the equivocal use of that word. How was this a contract of indemnity? If it be meant, that for a certain sum, *Thurmond* agreed to save harmless *Vannoy* against a doubtful demand of *Crissman*, or one which the parties thought doubtful, it covers a case of mere wager; and in that point of view, it is immaterial, whether the demand to which the risk

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related, were one for interest, or for any other cause. But then it must appear upon the obligation, by a fair construction, that such was the nature of the contract; or if the contrary there appear, it must be shown, by other proof, that such was in fact the agreement, and that the writing, as framed, does not express the truth, and was so framed by mistake—not as to the effect, in law, of the contract as stated, but as to the terms of the agreement itself. No such proof is offered here; and the case is left on the bond itself. By the terms of that instrument, the agreement is not shown to have been for an indemnity of the kind alluded to; but on the contrary it is shown, that it was not for such an indemnity. It is express, that the debt is for "money lent," and that *Thurmond* is to pay "the interest," which *Vannoy* was liable to pay to *Crissman*. There is nothing which can lead us to suspect, that *Crissman's* right was doubtful, or that any one of the parties thought it so. If then an indemnity was contemplated, of what sort was it? Simply, that which consists in one person paying to another *as interest upon a loan*, whatever this last had agreed or was bound to pay, as interest, to a third person. The bare stating it thus goes far towards understanding and answering the objection. In such a case, the notion of indemnity cannot give a color to the transaction. The reference to the interest for which the obligee was liable, was only to ascertain that which the obligor was to pay. And if the parties thought that the obligee might lawfully reserve that rate of interest, because he was paying it, that would not help the defendant; provided the obligation to pay was absolute upon the borrower. It would be a mere misconstruction of the statute; which cannot be heard as an excuse. If the interest reserved exceed six *per cent* at all events, the bargain is corrupt in the sense of the statute; that is, it is a violation of the statute. If the term *indemnity* be understood in this last sense, there was no error in leaving it to the jury. For it is no excuse for the defendant, that this was an effort to save himself from loss by reason of a previous liability of his own; and there-

But an agreement, whereby the borrower agrees to pay the lender the same rate of interest, which the latter is bound to pay a third person, and which exceeds the legal rate, is not a contract of indemnity, within the meaning of the rule; and this, whether the obligation of the lender be created by act of law, or by stipulation.

fore, he gains nothing. It is like selling out stock at a loss, and charging the borrower with the loss. (*Moore* v. *Beattie Amb.* 371.) Indeed the avoiding of a loss is a gain. But if it were not, the true inquiry is, whether he reserved as interest on the loan made *by him* a higher rate than six *per cent*, and received it as and for the interest reserved. The reference to his own liability upon a distinct matter is nothing. If that liability arose from his agreement to pay twelve *per cent* to a third person, it is manifest that he cannot rightfully make himself whole, by the loan of a like sum to another at the same rate. The interest payable by him, does not make that to be received by him legal. It makes no difference, to this purpose, whether the liability of the lender for the excessive interest be created by stipulation, or arise by act of law. As against him, the rate of interest may be lawful; but as between him and the person to whom he lends the money, it is unlawful.

Such is precisely this case. For, I repeat, the bond explicitly declares, that the money was lent by *Vannoy* to *Thurmond*, and adjusts the rate of interest, *as such*; and it was afterwards paid as such. The rate fixed on is illegal. This is done by referring to the liability of *Vannoy* to *Crissman*; and that liability was certain, according to the case. Indeed, the bond is not even, that *Thurmond* should pay to *Vannoy* what the latter should pay to *Crissman*, or what *Crissman* should recover; but what *Vannoy* was liable to pay, which the case states was twelve *per cent*. If this defence were sustained, one of the most effective securities for the performance of their duties by sheriffs would be destroyed, and at the same time needy men exposed to the most inordinate exactions, on the part of those persons, whose official situations give them the best means of discovering, and profiting by the necessities of the distressed.

The payment of usurious interest to the sheriff, or to an assignee, and much more to an agent completes the offence

The next position is, that as the act is highly penal, the case must be brought strictly within it; and therefore, that the receipt of the money must be by the defendant personally. To this there are two answers. It has often been decided, that payment to the sheriff on

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an execution, or to an assignee completed the offence: much more, to an agent. But here the defendant was present, when the money was counted to his agent. He then recognized it, and surrendered the bond as thereby paid. This was a payment to himself.

The omission to date a writ can only be taken advantage of by plea in abatement.

Two objections are then taken, as arising out of the record. The first is, that the writ is without date. If this were true, it is too late, after an appearance and a plea in chief, to make it. It ought to have been pleaded in abatement. But it is not true. Tho' the year of the Christian era is not given in the *teste*, yet that of American independence is; and the former is stated in the memorandum of the clerk, at the foot, of the day of issuing the writ.

A verdict that "the statute of limitations does not bar," is not responsive to the issue, and is erroneous.

The other ground for arresting the judgment is, for the defect of the verdict upon the issue on the plea of the statute of limitations. The words are: "the jury find, that the statute of limitations does not bar." The authorities cited for the defendant, very satisfactorily prove, that the verdict in this form is bad. It is not a direct response to the issue upon the point of fact, and upon that alone. The fact is to be collected by inference only, and then is not certainly separated from matter of law. If therefore, the judgment of the court necessarily turned on the finding of the time as thus stated, it is very uncertain what might be the determination. The truth is, that regular *entries* are seldom made in our courts. This is owing mainly to the want of capacity in the clerks, which is likely never to be remedied, until increased business and adequate compensation shall induce competent persons to accept the office. But the court cannot but take notice, that this state of things, and perhaps also their own ease, have given rise to an almost unlimited confidence of the bar in each other, that all necessary amendments of form in the acts of the clerk shall be made or intended, when the occasion shall call for them. The court would, therefore, very reluctantly yield definitively to this objection. But we could resist it no further, probably, than by considering the entry not so much the verdict, as the minute for it; and staying the

But it is such a minute of the verdict as to enable the Superior Court to correct the entry;

judgment here, until the plaintiff could move the Superior Court to amend the record consistently with the minute, and bring up the transcript as amended. That court can mould the verdict into due form: there is no such power here. I mention this, that counsel may be aware of the difficulty, arising out of the constitution of this court; and be more attentive to the making up of the record, where it is to be revised. If brought to judgment upon a defective verdict, this court has no discretion, and must, of necessity, award a *venire facias de novo*.

and although the Supreme Court cannot make this correction, but if it proceeds to judgment, must award a *venire facias de novo*, yet it will stay the judgment, till the correction is made in the court below.

That such is not the judgment in this case, is owing to the uncommon circumstance, that the fact, intended to be found upon that issue, is found upon another. In popular actions, the statute of limitations need not be pleaded, if *nil debet* be. It is a part of the plaintiff's title or right, that he hath sued, and hath sued in due time. The burden of proof is on the plaintiff, and if his action be not brought within time, he is, upon the general issue, nonsuited. (2 *Saun.* 63 *a. note*). If the same matter be put twice in issue, by several pleas, there is no authority that the verdict must refer to each issue. If the act itself be affirmed, that is enough. Here the jury do find, that the defendant owes *the plaintiff* the debt demanded; which cannot be, unless the plaintiff brought suit within the three years limited by the act of 1808.

In popular actions, under *nil debet*, the plaintiff must prove his action to have been brought within the period of limitation; and when that plea is entered, a special plea of the statute of limitation presents an immaterial issue.

PER CURIAM.—JUDGMENT AFFIRMED.

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JAMES J. TREDWELL v. WILLIAM D. RASCOE.

The purchaser of partnership effects, under a *fi. fa.* against one copartner, takes them subject to the accounts of the partnership, and can only claim a share of the surplus after payment of the debts. But the sheriff is in no way affected by this equity between the purchaser and the other partners.

TRESPASS, against the defendant, for seizing a quantity of salt, the property of the plaintiff.

The case of the plaintiff was, that the salt arrived at Edenton in February, 1828, from Turk's Island, consigned to the order of the shipper, *Lewis Leroy*, who was a copartner of one *Blair*, residing at Edenton; that the bill of lading had been indorsed by *Blair* to the plaintiff, and that the latter had secured the duties upon the salt, and had taken out a permit for the landing of it—that before the whole of it was landed, the defendant took possession of it, and sold it—that at the time of the sale, none of the salt was present, except one bag as a sample, part of it being then in a store-house of which the defendant had the key, and the residue was on board the vessel in which it arrived—the captain of the vessel declaring that he would deliver it upon being paid his demurrage, and having the duties secured.

The defendant justified under a *fi fa.* issued to him as sheriff of Chowan, upon a judgment against *Blair*, tested of the December term, 1827, of Chowan County Court, and returnable to the succeeding March term. He proved that upon the arrival of the salt, *Blair* and the plaintiff went to the custom-house together—that *Blair* said, he wished to enter the salt and secure the duties—that he commenced writing the oath preparatory to making the entry—but before he had completed it, he told the plaintiff he would not enter the salt, for fear some of his creditors should seize it, or give him trouble about it, and asked the plaintiff to enter it for him. That the plaintiff consenting, *Blair*, under a power of attorney, from *Leroy*, indorsed the bill of lading to him—whereupon he secured the duties.

His Honor Judge NORWOOD instructed the jury, that if *Leroy* and *Blair* owned the salt, in partnership, the share of *Blair* in it was nevertheless liable to seizure under an execution against him—and that the purchaser would be a tenant in common with *Leroy*, although in a court of equity he would be bound by the state of the partnership accounts. That the indorsement of the bill of lading would enable the plaintiff to maintain this action without actual possession—that the indorsement was also *prima facie* evidence of a consideration paid by the plaintiff, but might be explained by parol testimony, and if without value, or made to defraud creditors, was void. And further, that when the lien of the United States for the duties was removed, the lien of the execution attached upon the salt, and prevented *Blair* from transferring his interest in it, so as to defeat that lien.

A verdict was returned for the defendant, and the plaintiff appealed.

The case was submitted without argument, by *Gaston*, for the plaintiff, and by *Hogg*, for the defendant.

HENDERSON, Chief-Justice.—I cannot perceive the least objection to the instructions given by the presiding judge. That partnership property is liable to the separate debts of individual partners; that a consignment without value will not transfer the property; that an assignment of the consignee without value has no greater effect; that a transfer by or for a debtor after the teste of a *fi. fa.* is fraudulent, and void against the creditor; that goods afloat, before duties paid or secured, are liable to seizure under a *fi. fa.* saving nevertheless the rights of the government, are all propositions, I think, which cannot be contradicted. It is true, that the purchaser of partnership property, under a *fi. fa.* against one of the partners, stands in the place of such partner, and can only claim, so far as the article purchased extends, what that partner could claim, that is, a share in the profits, or rather surplus, after the payment of the debts of the firm. But what are the rights

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of the purchaser, or his relation to the other partners affects not the creditor in the *fi. fa.* or the sheriff, who has seized the partnership effects.

I have considered this case divested of the imputations of fraud, which appear to be justly ascribable to it. But if they are considered, I cannot perceive even the shadow of a doubt. *Blair*, the debtor, when about to enter the goods, either in his own name, or in that of *Leroy*, or in that of *Leroy* and *Blair*, requests the plaintiff to permit them to be entered, or to have them entered in his, the plaintiff's, name; and this with an avowed intent to hinder or delay his creditors, or to save himself from trouble in regard to them; meaning no doubt a contest with his creditors. The plaintiff assents, and becomes his instrument for such purposes. The whole transaction, if these be the facts, is fraudulent and void; not only by a legal inference, as being done after the *teste* of the *fieri facias*, but by an actual, express and designed fraud, to-wit, fraud in fact; and deserves no countenance, either in law or morals.

As to the sheriff's not taking actual possession, not having the property present at the sale, and not delivering it to the purchaser, if these were wrongs, they were wrongs to others, and not to the plaintiff. If he seized not the goods, then even the allegation of the plaintiff fails; and this action, for that reason, fall to the ground. If he had not the goods present at the sale, and the sale should thereby be void, in this also the plaintiff is not concerned or injured. If he did not deliver the salt to the purchaser, how is the plaintiff affected thereby? But it requires not an actual seizure—a manucaption—to make a seizure or arrest in law. A submission to the dominion, power, will or control of the officer, is sufficient; is a potential possession. And I apprehend here all was done that the law required. The captain declared that he would deliver the salt to the purchaser upon the duties being paid, and the purchaser accepted it on these terms. The salt being afloat, could not in that state be brought on land, without a permit from the custom-house officer, which he would not grant until the duties were

Actual possession is not necessary to the validity of a sheriff's sale. It is sufficient if the goods are subject to his control.

secured, which the sheriff was not bound to do. Nor was he bound to take notice, that the plaintiff had then secured them; or if he did, he secured them apparently for himself, and not for *Blair*; and he did not apprize the sheriff of what he had done, and require him to have the salt present at the sale. Under these circumstances, the sheriff sold by a sample; and I think the law required nothing more of him. But the case needs not this protection. The plaintiff cannot complain of these acts as omissions, for as to him they are immaterial.

PER CURIAM.—JUDGMENT AFFIRMED.

HENRY GARDNER v. ISAAC LANE.

A writ signed by an attorney, under a verbal authority of the clerk, is a nullity; and its subsequent recognition by the clerk or sheriff will not render it valid.

The case of *Shepherd* v. *Lane* (*ante* 2 *vol.* 148) approved by RUFFIN, Judge.

This was a special action on the case tried before his Honor Judge SWAIN, at Randolph, on the last circuit. The plaintiff declared against the defendant, as sheriff, in two counts; first, in neglecting to execute a writ of *capias ad respondendum*, sued out by the plaintiff in 1824, against one *Shubal Gardner*; and second, for making a false return to the writ. Upon the trial, on the plea of not guilty, the plaintiff proved the issuing of the writ, that it came to the hands of the defendant, who failed to execute it, and made a false return thereon.

The defendant proved, that the paper which purported to be a writ in that cause, was not signed by the clerk of the County Court, but by an attorney. But it appeared that all the attorneys practising at that court, had been verbally authorized by the clerk to fill up and sign writs of *subpœna* and *capias ad respondendum*, which had always been recognized by the clerk as valid; and that the writ in question was, upon its return by the sheriff,

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put upon the files of the court by the clerk, who ratified and confirmed the act of the attorney.

The plaintiff also proved, that the defendant had received the same authority from the clerk, and was in the habit of signing the clerk's name to writs, and that he, the defendant, was well acquainted with the handwriting of the attorney, who signed the writ against *Gardner*.

Upon this testimony, the plaintiff's counsel prayed the court to instruct the jury, that if they believed the defendant knew the writ to be in the handwriting of the attorney, and that the attorney had authority from the clerk to sign his name, and had, as sheriff, recognized the paper as a valid writ, he was liable to the plaintiff for neglecting to execute it. The court refused the instructions prayed for, and upon the authority of *Shepherd* v. *Lane* (*ante* 2 *vol.* 148) directed the jury, that a writ signed by an attorney, who was neither clerk nor deputy, was a nullity; and the sheriff was not liable for neglecting to act under it, nor for making a false return.

A verdict was returned for the defendant, and the plaintiff appealed.

The court refused to hear *Winston*, for the plaintiff.

Gaston and *Nash* were to have argued for the defendant.

RUFFIN, Judge.—The case of *Shepherd* v. *Lane* is decisive of the present. The new matter shown here, that the defendant knew the writ was not signed by the clerk himself, but by the attorney in the clerk's name, does not distinguish it. For the court say, that the recognition by the sheriff, could not give a character to the instrument, which it did not in itself possess. And whether this recognition was given under a mistake of the fact, or in disregard of the law, the plaintiff can take no advantage of it.

The direct authority of *Shepherd* v. *Lane* is imperative upon the court. It would be so with me, did I, as an individual, retain ever so strongly the opinion given by me upon the trial of that cause on the circuit. A point

of this sort must be considered as settled by a decision of this court, upon full argument.

PER CURIAM.—JUDGMENT AFFIRMED.

JOSHUA YOUNG *v.* PETER HAIRSTON.

McRae vs Silly 1 Ired. 118

When there are several counts in the declaration, and on one of them improper evidence was received, if the party against whom the evidence was offered obtained a verdict on that count, he has no right to a new trial on the other, on which the verdict was against him.

This was an action on the case, in which the plaintiff declared in two counts; 1st, for slanderous words, in accusing the plaintiff of stealing sheep; 2d, for maliciously prosecuting the plaintiff for stealing sheep.

The defendant pleaded not guilty, and the statute of limitations. The cause was tried before his Honor Judge SWAIN, at Guilford, on the last circuit. The plaintiff proved the speaking of the slanderous words, charged in the declaration; and to support his second count, produced the original record of his acquittal in Stokes County Court, where a charge of stealing sheep was preferred against him by the defendant. He also proved, that the slanderous words were spoken by the defendant immediately after the verdict of not guilty was returned, and relied upon the date of the verdict to rebut the plea of the statute of limitations. The defendant objected to the introduction of the original record of Stokes County Court, and insisted, that by an act of Assembly, the plaintiff could only use a certified copy. The objection was overruled, and under the instructions of his Honor, the jury found a verdict for the plaintiff, on the first count in his declaration, and assessed his damages to $1250; and on the second count, a verdict was returned for the defendant.

A rule for a new trial was obtained, 1st, because the original record had been improperly read to the jury; and 2d, because the damages were excessive.

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His Honor being satisfied with the verdict, as to the damages, and thinking, if there had been any error in permitting the original record to be read, it had not prejudiced the defendant, as the jury had found for him on the second count, discharged the rule, and the defendant appealed.

No counsel appeared for the defendant, and the case was submitted without argument, by *Nash*, for the Plaintiff.

HALL, Judge.—The case states that the plaintiff introduced the original record of the trial, for the purpose of supporting the second count in his declaration, which was for a malicious prosecution; and that this evidence was objected to by the defendant's counsel, on the ground that an act of Assembly required the production of a certified copy, and not of the original record in such a case. The act of Assembly relied upon has not been pointed out; and the regret is the less, as the plaintiff has failed upon that count in his declaration, and the defendant can have no interest in further examining the question.

With respect to the testimony introduced by the plaintiff, in reference to the plea of the statute of limitations, the objection taken cannot be sustained. The witness stated, that the words were spoken after the trial of the indictment in the County Court. It was surely competent for the plaintiff to prove by the record, when the trial took place; and the record for that purpose was entirely sufficient.

Upon a rule for a new trial on the ground of excessive damages, the decision of the Superior Court is conclusive.

With respect to the claim which the defendant may have for a new trial, on account of the damages being excessive, it is sufficient to say, that the judge of the Superior Court, who tried the cause, was the sole judge of that question. He has stated, that he was satisfied with the verdict. This court did not hear the evidence, and of course ought not, and cannot control any opinion of the judge below, formed upon that evidence.

PER CURIAM.—JUDGMENT AFFIRMED.

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WILLIAM B. WILSON v. MORGAN HUDSPETH *et al.*

Sureties for the prosecution of a suit, are bound for the costs accruing before, as well as after the execution of the bond.

This was an action of DEBT, upon a bond given for the prosecution of a suit, brought by the defendant, *Hudspeth*, against the plaintiff; which was "to be void, "if in case of failure in the said suit, the said *Morgan* "*Hudspeth* pay and satisfy all the costs and charges "that may accrue therein." After *oyer*, the defendants pleaded *non infregerunt conventionem*.

Upon the trial, before his Honor Judge MARTIN, it was admitted by the defendants, that *Hudspeth* had failed in his suit, and had not paid the costs, and that the whole costs amounted to $117, but they contended that at the execution of the bond, the costs of the plaintiff amounted only to $58.

The jury, under the instructions of his Honor, returned a verdict for the plaintiff for all the costs of the suit, and the defendants appealed.

No counsel appeared for the defendants.

The *Attorney-General* for the plaintiff.

HALL, Judge.—After stating the case as above, proceeded: The doubts which have brought the case before us are not readily discerned. The condition is that *Morgan Hudspeth* shall pay all the costs, that shall or may accrue upon a contingency that may happen after that time, namely, a *failure* faithfully to prosecute the suit against *Wilson*. Such failure has taken place, and *Hudspeth* has failed to pay the costs. The defendants are therefore bound to pay all the costs accruing therein. All the costs are the costs which accrued before, as well as the costs which accrued after the date of the prosecution bond given by the defendants.

PER CURIAM.—JUDGMENT AFFIRMED.

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James Mills v. Luke Huggins.

Tender and refusal are equivalent to a performance. But proof of ability to perform is necessary. As where upon a contract to deliver promissory notes, the defence was, that the plaintiff refused to receive them, and insisted upon a part payment in money, and no evidence was offered of the defendant's ability to deliver the notes, it was held, that the plaintiff was entitled to recover.

Assumpsit, upon an express contract by the defendant, to receive a quantity of pork from the plaintiff, and to pay the stipulated price in good promissory notes.

Plea—*non assumpsit.*

The plaintiff having made out his case, the defendant proved, that after the delivery of the pork, he offered to pay the price in notes, which the plaintiff refused, insisting upon having some cash with them.

His Honor Judge Strange charged the jury, that ability as well as willingness in the defendant, at the time of making the offer, was essential to his defence, and that unless they were satisfied that at the time of making the offer, the defendant had the notes in his possession, and was willing and ready to deliver them, they ought to return a verdict for the plaintiff.

A verdict was returned for the plaintiff, and the defendant appealed.

J. H. Bryan for the defendant.

No counsel appeared for the plaintiff.

Henderson, Chief-Justice.—Ordinarily, nothing less than actual performance satisfies an engagement to do an act. But in acts which require the concurrence of both parties, if one party does all he can to perform his engagement, and the act remains undone, merely for the want of the concurrence of the other party, the party doing all in his power is entitled to the benefit of an actual performance. I speak not now of the *semper paratus*, and the *profert hic in curia*. They are incidental to some, and not to all engagements. It must therefore be the non-concurrence of the other party

which discharges the defendant from the actual performance. If one person is bound to pay money, or deliver a horse to another, and that other will not receive it *when offered*, the party making the offer is excused *ex necessitate* from an actual performance. As one party may by acts, such as a refusal to receive, prevent the other from performing, so he may, by words, discharge him; as by saying, when a tender is about being made, "it is needless to offer, for I will not receive it," or similar expressions. There, if performance was prevented by such declarations, it will be excused. But in order to this, an actual ability at the time must appear. For otherwise, the performance was not prevented by the declaration. In this light it was viewed by the presiding judge. Therefore, there is no error in the case. The defendant was not *hindered* by the plaintiff.

PER CURIAM.—JUDGMENT AFFIRMED.

WILLIAM INGRAM v. HULL THREADGILL.

Although by the acts of 1715 and 1777 (*Rev.* c. 6, & 114) the beds of rivers and creeks are not subject to entry, yet where the river or creek is not navigable, in the ordinary meaning of the term, the owners of the banks have a several fishery opposite their land, to the middle of the stream.

TRESPASS, for fishing in the plaintiff's several fishery.

Upon not guilty pleaded, the jury returned the following special verdict:

"That the plaintiff had title to, and was in possession of a tract of land, bounded by the Pedee River—that the defendant had title to, and possession of a tract of land adjoining the plaintiff's, immediately below, and also bounded by the Pedee—that the defendant, at the time alleged by the plaintiff in his declaration, drew his seine, and did fish with the seine in the channel of the river, and between the channel and

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"the shore, and near the shore where it formed the "boundary of the plaintiff's land on that side—that the "*locus in quo* is the main Pedee River, about thirty-five "miles above the point to which the river is navigable "for steam-boats—that at the *locus in quo*, the river is "about three hundred yards wide, and about four and "a half feet deep—that heretofore the river has been na- "vigated with batteaux and flats to a point above the "plaintiff's land; but that there has been no navigation "of that kind for the last twenty years—that about "fourteen miles below the *locus in quo*, the river is nearly "a mile wide, and is never navigable for batteaux, ex- "cept in time of high water, and then with difficulty."

Upon this verdict, his Honor Judge MARTIN rendered judgment for the defendant, from which the plaintiff appealed.

Badger, for the plaintiff, referred to *Hooker* v. *Cummings* (20 *John. Rep.* 90).

Devereux, for the defendant, cited *Wilson* v. *Forbes* (*ante* 2 *vol.* 30) *act of* 1715 (*Rev. c.* 6) *& act of* 1777, (*Rev. c.* 114, *s.* 10).

HALL, Judge.—The act of 1715 (*Rev. c.* 6) declares, that where a survey is to be made upon a navigable river or creek, the surveyor shall run a full mile in a direct course into the woods, and each opposite line shall run parallel with the other, if it can be admitted, for other people's lines, or rivers or creeks. It is provided also, that not more than six hundred and forty acres shall be laid out in one tract. The act of 1777 (*Rev. c.* 114, *s.* 10) declares, that where any survey shall be made upon any navigable water, the water shall form one side of the survey. The same act provides the mode of entering and surveying islands in navigable waters. It appears from these acts, that the beds of navigable waters, and of navigable rivers and creeks, cannot be the subject of entry and survey. Therefore, the plaintiff, in the present case, cannot derive title to the fishery in question, by grant from the state, as he might do for lands, under those acts of Assembly. And if he

has title, it must be derived by some other mode of acquisition.

In England, a river is said to be navigable, where the tide flows and reflows. Where that is not the case, they are said not to be navigable. In the latter case, the proprietors of the land on the river, have the right of fishing on their respective sides, to the middle of the stream—*ad filum medium aquæ* (*Carter* v. *Murcot* 4 *Bur.* 2162 *Rex* v. *Smith Doug.* 441).

This definition of a navigable river seems not to be applicable to rivers in this state. They are in fact navigable for all the purposes of public convenience, in many places beyond the influence of the tide. But perhaps, at a point beyond the purposes of navigation, they may not be so considered, that is, to be free fisheries. In England, the reason why the king has an interest in a navigable river, as far as the sea ebbs and flows in it, is because such a river participates of the nature of the sea; and is said to be a branch of the sea as far as it flows; and consequently he is entitled to the fishery in it. For it is said the king hath dominion over the sea; and that every subject hath a right to fish in the sea, and in a navigable river belonging to the king. (*Davis Rep.* 252, *Warren* v. *Matthews* 6 *Mod.* 73.) From these premises it would result, that the fishery in a river which was navigable, but which was not identified with the sea, by being subject to the ebbing and flowing of the tides, would belong to the riparian proprietor. On such a case, however, it would be improper to give an opinion. Such is not the case before the court. The Pedee River, at the place where the trespass is alleged to have been committed, is not a navigable river, but a private one. And the owners of the land on each side of it have a right to the middle of it. The same may be said of rivers which divide nations. (*Handly* v. *Anthony*, 5 *Wheat.* 374.)

The ebb and flow of the tide is not a proper criterion to determine whether a river of this state is navigable.

It seems, that a fishery in a river which is not affected by the ebb and flow of the tide, but which is in fact navigable, belongs to the riparian proprietor.

Altho' these franchises or fisheries are not granted by the state as lands are by law granted, yet when the lands adjoining such rivers are granted, the right of fishing vests in such grantees, and gives them the right of fish-

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ing to the middle of the stream, in the water opposite their land; but not the right of fishing in water above or below the banks which belong to them.

PER CURIAM.—JUDGMENT REVERSED.

JOHN GRICE v. JETHRO RICKS.

Ordinarily, the act of an attorney in a cause is taken to be the act of the party whom he represents. But where the assignor of a note stipulated, that it should be placed by the assignee in the hands of a particular attorney for collection, and by the act of that attorney the interest of the assignor was injured, *it was held*, in a question between the assignor and the assignee, that the former was bound by the act of the attorney, and the fact that he had no redress against the attorney, did not discharge him.

ASSUMPSIT, upon a special contract, tried before MARTIN, Judge, at Nash, on the spring circuit of 1830.

Upon *non assumpsit* pleaded, the case was, that the defendant had assigned to the plaintiff a note, made by one *Lemon*, payable to the defendant, and had written over his indorsement the following words: "I assign the within to *John Grice*, until paid." The plaintiff then proved, that when this indorsement was made, it was agreed between him and the defendant, that the note should be placed immediately in the hands of an attorney named by the defendant, for suit, and that if the amount due on it was not collected, he, the defendant, would be answerable—that suit was immediately commenced by the attorney designated by the defendant, who was retained by the plaintiff. The writ was in *assumpsit*, and was returnable to the ensuing November term of the County Court—that at February term the writ was amended, so as to be in *debt*, and judgment entered up, with a stay of execution until May term following. The defendant proved, that if execution had issued from February term, the amount of the judgment would have been realized.

There was no evidence offered by the plaintiff, that notice had been given to the defendant of *Lemon's* default in making payment of the note.

His Honor instructed the jury, that to enable the plaintiff to recover, it was necessary for him to show, that there had been due diligence used by him to collect the amount of the note from *Lemon*. That granting a stay of execution for three months, was evidence of a want of that diligence, and that if the neglect was the act either of the plaintiff or of his attorney, he could not recover. That the attorney was the agent of the plaintiff, and was responsible for misconduct to him only. That the defendant had no redress against the attorney.

A verdict was returned for the defendant, and the plaintiff appealed.

The *Attorney-General* and *Seawell*, for the plaintiff.

Gaston, *Badger* and *Devereux*, for the defendant.

RUFFIN, Judge.—It is not disputed, that the giving of time, whereby the debt was lost by the insolvency of the debtor, discharged the defendant as an indorser or guarantor; provided it was the act of the plaintiff himself, or of one for whose acts the plaintiff was responsible.

Ordinarily, an agreed entry in a cause is taken to be the act of the parties. And also, ordinarily, the act of an attorney is taken to be the act of the party to the suit whom he represents. If therefore the case stood simply upon the effect of the contract, as written in the indorsement, the charge of the court would have been correct. But it was part of the agreement, as was proved *viva voce*, that the note transferred should be put in suit immediately, under the management of a particular attorney. He might have possessed the especial confidence of the defendant, and upon that his willingness to guaranty might have been founded. Indeed the attorney might have been selected by the defendant himself, and that provision introduced at his instance and for his benefit. In that case, the defendant must be considered as contracting for his skill and diligence. That he could not

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sue the attorney for wilful or negligent mismanagement does not determine this point; for one may bind himself, that a stranger shall do a particular act. At most, it would be a circumstance, which might incline a jury to think that the attorney was selected by the plaintiff, and not by the defendant. In the opinion of the court, therefore, it ought to have been left to the jury to say, whether the plaintiff or the attorney gave the stay of execution; and if the latter, whether the plaintiff or defendant selected the particular attorney, and agreed to be responsible for his conduct, as between themselves. And if the cause depended on that, there would be a new trial.

Where a party, against whom a judge expresses an opinion, refuses to submit to it, but puts his cause to the jury, and is unsuccessful, altho' the judge may have erred, yet the judgment is not to be reversed, if upon the whole case it is correct.

But the case further states, that the plaintiff gave no evidence of notice to the defendant of non-payment, or that he was looked to. If such notice was necessary, the judgment must stand, altho' the court may have erred in other respects. The plaintiff would not submit to a nonsuit under the opinion of the court, adverse to him on one point. But he put his cause to the jury, choosing to run his chances for a verdict upon the whole case. If upon the *whole* case *the verdict was right*, it must stand. The point of notice was made by the defendant; and if, under any circumstances, the plaintiff could not recover upon the pooof made by him, there is no ground to disturb the verdict; since the error of the court upon a different matter did him no harm.

Where the liability of a party is not direct, but collateral, and dependant upon the default of another, he must be notified of a default before he can be charged.

Was notice necessary? We think it was. It is a general rule of law, founded in sound reason, that where the liability of one party is not absolute and direct, but is upon a collateral obligation, dependant upon, and arising from certain things to be done by the other party, and lying peculiarly within his knowledge, he, who is to take benefit by the engagement, must give the other notice of what has been done, and that he is held liable. From the nature of things, notice is part of the agreement; and the debt does not arise before notice. It is of the nature of a special request; and must be alleged in the declaration, and proved. Such is the contract of an indorser, under the law merchant; which is only one species of guaranty well defined indeed, and settled by long usage

A guarantor is entitled to notice, although to charge him, the same strictness in giving it is not required as in the case of an indorser.

The doctrine has been applied to guaranties for goods sold. (*Russel* v. *Clark*, 7 *Cranch.* 69.). It has also been applied to a guaranty of a note or bill. It is true, that as to the time of giving notice, the rule is not so strict, as it is between indorser and indorsee. But notice in a reasonable time and before suit is indispensable. (*Phillips* v. *Astling*, 2 *Taunt.* 206.) What duty existed on the part of *Ricks*, until *Grice* gave him notice that the principal debtor had not paid the debt? How was *Ricks* otherwise to know, that *Grice* had not received the money? Was he bound to volunteer payment? We think not; but that upon the authorities, notice to the defendant formed a necessary part of the plaintiff's case.

PER CURIAM.—JUDGMENT AFFIRMED.

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The *terminus* of a line must be either the distance called for in the deed, or some permanent monument, which will endure for years; the erection of which was cotemporaneous with the execution of the deed. A stake is not such a monument, and evidence of its erection when the land was surveyed is not admissible, to control the course and distance.

After the new trial granted in this case (*ante* 2 *vol.* 415) it was tried again at Lincoln, on the last circuit, before his Honor Judge MARTIN.

The lessors of the plaintiff claimed title, 1st, under a grant to *James Dickson*, dated in 1785.

2d. By a deed of bargain and sale, dated in 1791, from *Dickson* to *Wallace Alexander*, for lot number 8, in the town of Lincolnton, which had been laid off on the land covered by the grant to *Dickson*. The lot was described as beginning at a stake, the north-east corner of lot number 2, running thence six poles north-east, along the main street to a stake, thence running so as to form an oblong.

3d. By a deed from *Alexander* to *Henry Cline*.

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4th. By a deed from *Cline* to *Jacob Summey*, dated in 1800, for a part of lot number 3, beginning at the north-east corner of a house standing on the main street, thence south-east twelve poles to a stake, thence four poles and three feet south-west to a stake, thence north-west twelve poles to a stake, and thence to the beginning.

5th. By another deed from *Cline* to *Summey*, dated in 1800, and also for a part of lot number 3, beginning at the north-east corner of the house standing on the lot, and mentioned in the last deed, running thence south-east twelve poles, to a stake, thence north-east one pole and thirteen feet to a stake, thence north-west twelve poles to a stake, thence to the beginning, being the north-east corner of the original lot, number 3.

6th. By a deed from *Summey*, also dated in 1800, to *Martin Shuford*, one of the lessors of the plaintiff, for the whole of the lot number 3, in which it was described as beginning at the north-east corner of lot number 2, running thence along the main street six poles to a stake, thence so as to form an oblong.

The defendant claimed lot number 2, which adjoined number 3, under a deed from *Dickson*, dated in 1787, which described it as measuring in front six poles.

The premises in dispute consisted of a piece of land, seventeen feet wide in front, and the only question was, whether the defendant's deed covered it; for if it did, his possession had been such as to protect him under the act of 1715. If the front of each lot was six poles only, then the defendant's deed did not cover the land in dispute. If, on the contrary, a front of six poles and six feet was allowed to each lot, then it was clearly within the bounds of his deed. The defendant offered to prove, that although his deed called for six poles only, in truth, a front of six poles and six feet was intended; and that when the town was originally laid off, posts or stakes were set up at the corner of every lot, and the distance between these posts or stakes, in every instance, was six poles and six feet. The lessors of the plaintiff objected to the introduction of parol evidence.

to vary the description contained in the deed; but his Honor overruled the objection, for the reasons stated by him in his charge given below.

The defendant then proved, by a witness who purchased lot number 4, in the year 1787, that there was an old house standing on it, and at the corner of the house was a stake, which was pointed out to him as the corner of his lot—that the stake was a piece of split pine wood. This lot number 4 adjoined lot number 3, owned by the lessors of the plaintiff, on the side opposite to that where the latter joined lot number 2. The witness also proved, that by measuring from the centre of the public square (which was the beginning of the survey of the town) in a straight line to the point where the stake he spoke of was placed, and allowing six poles only to each lot, the distance would not reach that point, by about nineteen feet—but by allowing six poles and six feet to each lot, the distance would only fall short one foot. The same witness proved, that twenty-five years ago, *Shuford*, one of the lessors of the plaintiff, and himself, dug a well and erected a wash-house, so as to be upon the line between them, on the supposition that six poles and six feet was the front of each lot.

The defendant also proved, that a stake was standing on one of the corners of the public square in the year 1799, which was said to be the corner of it, and that measuring from that stake, and comparing the measurement with the erection of all the buildings on the square, six poles and six feet was the front of each lot.

The plaintiff, to rebut this testimony, proved by the original plan of the town, and the declarations of the surveyor who made it, who was dead, and of other old persons also dead, that six poles only was the front of each lot.

On the other hand, the defendant proved declarations of *Dickson*, the original proprietor, and of a purchaser from him, both of whom were dead, that in laying off the town, six poles and six feet was the front of each lot.

His Honor instructed the jury, that if from the evidence before them, they were satisfied that lots number

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1, 2 and 3, had been originally run and staked off, or posts set up for the corners, and that the width thus allotted to them was six poles and six feet, they should be governed by the lines actually run and marked; that if they were not satisfied by the evidence, that the boundaries had been thus run and marked, they should be governed by the description of the boundaries contained in the deed. That the question presented by the case was, whether parol evidence was admissible to control or vary the calls in the deeds. That it was believed, that a series of decisions authorized the introduction of parol evidence; but as the Supreme Court had declared, that they were not aware of any such series of decisions, it was necessary to examine the cases to see how the matter was. That the case of *Standen* v. *Bains* (1 *Hay.* 238) was decided in 1795. The plaintiff claimed to a *dotted line* on the plat of the survey made in the cause. The course and distance did not extend so far, but only to a *black line.* The court permitted evidence to be given, that the dotted line was *marked,* and had for a long time, since 1740, been reputed to be the line of *Arkill's* tract, which was the land claimed by the plaintiff—the court, in that case, saying, the jury may consider, whether there is sufficient evidence to satisfy them, that this dotted line is the real boundary, tho' not truly described in the patent. That the case of *Bountree* v. *Person* was approved by the court. That the case of *Blount* v. *Benbury* (2 *Hay.* 353) decided in 1805, was where the calls of the grant were for "*Beasley's* line, south 85 east," and the court permitted evidence to be offered to prove, that at the end of *Beasley's* line, the true boundary was a marked line, running parallel to *Beasley's,* and fifty one poles northward of it. That the court in that case remarked, that many *decisions* had been made, where the line described in the deed had been disregarded, to follow a marked line. That in the case of *Loftin* v. *Heath* (2 *Hay.* 347) the grant called for a beginning "at a cypress, and thence round to a pine at the creek," and evidence was admitted to show, that the beginning was at the pine and not the cypress; and TAYLOR, Judge,

remarked, "it must now be taken for law in this country, that notwithstanding any wrong description in the plat or patent, the party who is likely to suffer may show the mistake." That in *Slade* v. *Green* (2 *Hawks.* 218) HENDERSON, Judge, remarked, that "parol evidence had been admitted to vary the course and distance called for in the deed, by showing marked lines and corners, and where the deed refers to no such marks as boundaries, there is no ambiguity, and it is admitting parol evidence to control the deed. It is now too late to vary the rule." That in *McNeil* v. *Massey* (3 *Hawks* 91) it was decided, that where a patent calls for a tree as the beginning, and also calls for stakes for the other corners, that the course and distance will be controlled by a marked boundary, and that such a marked boundary may be proved to have been made, by adducing as evidence other grants calling for it; HENDERSON, Judge, remarking "such a boundary, like all other facts, may be inferred from other facts, if the fact proved be relevant to the fact to be inferred;" and alluding to other conterminous grants, calling for the boundary in dispute, he says "these facts pointed to something that controlled the courses and distances in the grants. Whether they proved that marked trees were once there, is an inference of fact for the jury. All the court can say is, that they are relevant."

That it was believed those decisions established the following principles, to-wit: 1st. That where the grant calls for course and distance, and also some particular object as the boundary, parol evidence is admissible, to show the position of this object, altho' it differs from the course and distance.

2d. That where the grant calls for course and distance, and also for a stake as the particular object, parol evidence is admissible to show, that a tree and not a stake is the object marked by the surveyor as the boundary, altho' it varies in all respects from the description in the grant.

3d. That where two different trees are marked, and it is apparent that they were marked at the same time,

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parol evidence is admissible to show, that one of them was designated as the beginning when the survey was made, altho' it varies wholly from the description in the deed; and the same kind of evidence is admissible to show a line, running in an opposite direction from the course in the grant; and running too in such a way, as would cause the beginning thus established to be in the middle of such a line, and not one of the corners. Such was the case in *Loftin* v. *Heath*; where it was pronounced to be settled law by Chief-Justice TAYLOR.

4th. That boundaries contained in other grants, where relevant, and likewise common reputation are admissible as evidence to establish boundaries.

That such were the principles which were believed to be applicable to the case under consideration. That the defendant alleged, that the lines of the town of Lincolnton had been run, and that the corners of the lots had been designated by stakes or posts, set up when the lines were run, and before the sale of the lots, and the conveyances before set forth. And that he offered to prove, by parol, the points at which those stakes or posts were placed, and that those points were at the distance of six poles and six feet. That there was an entire uniformity in the decisions of those cases, where the grant calls for course and distance, and it was proposed to be shown that a marked line was made, which varied from them. That it made no difference whether the marks be still in existence, provided they were originally made as the boundary. Could it make any difference in principle, whether the marks consisted of a chop on a tree, a stone, a stake, or a post? That trees bear the marks, where the lines are run in wood lands; but the boundaries of lots in towns are designated by posts, stakes or stones. That in the latter mode, it was proposed to be shown, that the town of Lincolnton had been laid off, and the facts before set forth, were offered in proof of it. The stake standing in 1789, as the corner of number 4, another stake standing in 1799, both of them reputed to be corners; the well dug, and the wash-house erected, between twenty and thirty years

ago, then and since acknowledged by the parties, as upon their lines; common reputation, the declaration of *Dickson* in 1792 or 1793; the present width of the public square; that such were the facts offered. That the question was not whether they were full proof, but whether they were relevant. That it was believed they were; and that the introduction of such testimony was authorized by a series of decisions. That the Chief-Justice of the Supreme Court, however, was not aware of any such series, and says that "for many years the Supreme Court have, in all cases except one, adhered to the description in the deed." That the case to which he alluded, was where the deed describes the land by course and distance only, and old marks are found, corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the course and distance, that they may well be supposed to have been made for its boundaries, the marks shall be taken as the *termini* of the land. This is going as far as prudence permits." That if this is to be the rule; it was believed that many decisions will be overruled, the settled law altered, and consequently titles rendered insecure. That by it, where description is by course and distance, no boundary will be permitted to vary from it, except it be made by chops on trees; for they are the only marks that can correspond in age with the date of old grants, by the distinct *laminæ* formed by the growth of each year; a post, stake, or stone would be wholly unavailable. That the decisions have been, that it was the line run or marked, that was to govern, if it could be ascertained. That this rule would restrict it to marks on growing timber. But a corner tree may be destroyed. That then it may be shown, where it stood; and should it not also be shown, where a corner stone, or a corner post or a corner stake stood? That in another part of the opinion it was said, that "marked *termini*" may control course and distance; but that this will not authorize the admission of the parol evidence above set forth. "For such acts or marks were not made to describe the calls of the deed, for the deed was

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made already." That this seemed to him to be forming an opinion of the kind of evidence legally admissible, from the effects it produced upon the mind of the judge. That the facts adduced were admitted as relevant circumstances, from which the jury might infer, that the lines of the lots were run, and stakes set up at six poles and six feet, before the deeds were made. That as to the stakes proved to have been standing in 1789 and 1799, it was a matter for the jury to say, whether they were "monuments of description, erected when the lots were separated from other lands." That it was not thought that the title could pass by parol, nor that the well and wash house were placed there when the lots were run. But they were relevant circumstances to show what was originally done. That the opinion of the Supreme Court admitted, that "such acknowledgements are evidence of the place where the marks or *termini* once were; but they are only evidence where it has been shown, that there were *some marks* to which such acknowledgments pointed." That in this case, a stake was proved to have been standing as a corner, in 1789, and another in 1799. That from that and other facts proven, it was left to the jury to decide, whether these posts or stakes and others had been set up as monuments of description, when the lots were laid off. That the grant of the land was in 1785. That when the town was laid out did not appear; but in 1789 the stake is described as an old piece of split pine then standing. That it surely could not be meant, that the mark must be in existence when the controversy arises; but it seemed to be decided, that some witness must have seen it; for it states "that there were some marks to which such acknowledgments pointed." That by this rule it was not perceived how the corner could be established, that had been destroyed time out of mind; altho' there might have been a uniform tradition where it stood, both by common reputation and the acknowledgments of the parties; accompanied too by very expensive improvements upon the land as claimed by each. That it was stated, that the law as laid down by the Superior

Court was an abstract proposition, true in itself, but wholly inapplicable to the case. That it was hoped, that the Supreme Court would perceive in the foregoing reasoning enough to show, that it was deemed to contain the principles on which the rights of the parties rested. His Honor in conclusion said he believed with confidence, that whatever disposition might be made of the case, nothing in his opinion could be supposed disrespectful to the Supreme Court, and that it would be a matter of sincere regret to him should such an inference be drawn; as he believed it most respectful to that court, to give it an opportunity of reviewing its own decisions, where they were supposed by the judges of the Superior Court to violate what the late Chief-Justice TAYLOR declared to be "*settled law.*"

A verdict was returned for the defendant, and the lessors of the plaintiff appealed.

Gaston, for the plaintiff, submitted the case without argument, upon the decision of the same case (*ante* 2 *vol.* 415).

Devereux, for the defendant, also submitted the case, relying upon the charge of the judge below.

HENDERSON, Chief-Justice.—I am glad that this cause has returned upon us; not that I am desirous of unsaying what I said upon the former occasion; for with that opinion, so far at least as it had a bearing upon the case, I am satisfied. But it affords me an opportunity of expressing myself fully upon what may be called stake boundaries. That stakes may be real boundaries, and so intended by the parties, and not mere imaginary points, I mean not to controvert. But I said before, and now think, that where they are given with course and distance, and no further description given of them; for example, "to a stake," or "thence to a stake in a line," they were intended by the parties, and so should be understood, to designate imaginary points; that is, where the line terminates, or intersects another line. And this, I say, is founded on universal practice and the nature of man. For having at hand a

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more certain and definite means of pointing out the object, as a cedar, a pine, or an oak—or a stake standing in a field, a wood, a pond, or near the road, creek, river, or some other additional means of description, and not using them, and having given the course and distance, they intended to rest on that, and that alone to point out the location of the stake, or rather where they intended should be the spot represented by the description of a stake. To permit parol evidence, to show that a stake was put up, or was seen at or near the spot, is to permit proof in opposition to the intention of the parties. For if one was actually set up, it was designed for some temporary purpose; and not as a land-mark, whereby the boundaries should be established. For the parties designed a more certain description. The court *should not* have heard the evidence, or having heard it, should have instructed the jury, that such evidence did not vary the description given by the course and distance in the deed. For it is the province of the court to declare, what are the calls of a deed, and where there are more than one call, which is the controlling one. What may be the proper rule, where the court can rationally perceive, that the parties intended by the word *stake*, something more than an imaginary point, by superadding a farther description in the deed, this case does not render necessary to say. But I suppose a court would be bound to say, if that intent was collected from the deed, however frail it might be, and however likely to produce mistake, fraud and perjury; yet as the parties had thought proper to make it their boundary, the court could not interfere. But even there, the proofs controlling course and distance, I think should be of the most satisfactory kind; and such intent should appear in the deed. *Prima facie;* where course and distance are given, nothing more than an imaginary point is presumed to be intended.

Judge Hall has with much force given reasons, why a stake should not in any case control the course and distance. So far as policy is concerned, his argument is unanswerable.

HALL, Judge.—Deeds for land, without location, are nullities. To be of any avail, they must in fact, or by way of reference, be fixed to the earth. They must be fixed to immovable objects. They may call for water courses, rocks, trees, or any thing immovable, that may be identified. Marked trees, the most common, are partly natural, and partly artificial boundaries. They are however immovable, and the marks are made for the purpose of identifying them. So long as these last, the location of the land is certain; it cannot be varied. When they become effaced and destroyed by length of time, there can, from the nature of things, be no written evidence to show the spots of ground on which they grew. Hence, necessity permits the introduction of parol evidence for that purpose. But if a deed for land is originally made without a location, and without a name, parol evidence has never yet been permitted to give it either.

Movable things may become the boundaries of land, when they become immovable; as a wall or a pillar of stones, or any other fixed, stable substance. I consider stakes to be only imaginary points. They bespeak more of locality, to be sure, than floating feathers on the water, but they are as unfit to be boundaries of land. Ordinary accidents may draw them from the earth, and destroy them. But deeds, impelled by all the force of wickedness and fraud, cannot pull up trees by the roots. Stakes would not answer the ordinary purpose of common honesty, and prove nothing in a contest for boundary.

Deeds must call for boundaries of the kind I have mentioned, and the furthest the common law has been departed from, is to connect deeds with such boundaries by parol evidence, where it appears they have been marked for that purpose, although the deed does not call for them; provided it is in part located, as by calling for some corner, or place not disputed, or to be disputed. If a half acre of land is sold, beginning at a particular corner, and the lines run accordingly, the half acre only passes, altho' the surveyor surveyed more

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than half an acre, because the lines were not properly marked. But if he surveyed more than half an acre, and marked the lines in a proper manner, the whole that he surveyed would pass. I concur altogether in the opinion of the Chief-Justice.

Ruffin, Judge.—I concur with the senior members of the court. The judge of the Superior Court, in the exposition of the reasons of his opinion, which he has given with ability, places the question upon the ground of the departure, which has been allowed in this state, from *the calls* of a deed. That he is correct in saying, that such a departure has been allowed, is beyond a doubt. There is no error in that. But he seems also to think, because parol evidence is heard, and upon it the deed is controlled, that therefore the sufficiency of proof is for the jury to determine. In that, I conceive, is the mistake. The truth of parol evidence is for the jury; so also its sufficiency, where it does not refer to some question of law. The stating of a few plain principles will set this question in a clear light. A deed is construed by the court, not by the jury. What land by its terms it was intended to cover, is just as much matter of law, as what estate it conveys. I do not mean, that the location of the *termini* is decided by the court; for that is to be learned only from witnesses. But *what* are the *termini*, wherever found by the jury, must be ruled by the court. Where a deed therefore is read, the court says, it covers the land only between such and such points. If any of the particular rules of construction, made necessary by our situation and adopted by our courts, are then resorted to, for the purpose of showing that it covers other and more land, than by its words it would, the evidence offered to that point, except as to its veracity, is still addressed to the court. It must be so; else the construction is with the jury. If a stake is called for, it is not to be proved to the jury, that there was a stake, and they told that if they are satisfied it was set up for a boundary, and are also satisfied that the boundary thus designated was made upon actual survey, they

may carry the deed to it, because in law an object thus perishable, and so easily destroyed or removed, is not sufficient to control the deed; and it would be just as reasonable to control it, upon mere proof of a survey to a particular spot, not at all designated by a call in the deed, nor marked by any erection whatever. The jury are not to hear this evidence as a ground of inference by them, that particular land was actually surveyed: because if it was surveyed, it was not conveyed by the deed. All matter is indeed subject to decay; but that portion of it, which must by nature be decomposed in a very short time, cannot be deemed a *land-mark*, sufficiently obvious and durable, to alter the construction of a deed. It is going far enough, to admit such an influence for objects longer lived than one or two generations of men. If then, after giving full credence to testimony, it does not establish a fact sufficient in law to alter the construction, the court must pronounce it. In other words, the court must pass upon the sufficiency of the proof. There is no difficulty in understanding this, if we suppose the court, as regularly they might and perhaps ought, to call on the counsel to state the purport of his evidence, when he offered the witness. If it did not establish a case for going off from the deed, no part of it could be heard. It would be irrelevant, because insufficient for the purpose designed.

Stakes have never yet varied the construction. *Marked trees*, tho' *not called for*, have, where they were proved by the annual growth to have been marked for the particular tract. To relax the rule still further, would be to let in an inundation of fraud, perjury and alteration of land-marks. Difficulties enough have been experienced in expounding and locating deeds under the established rules; and the safety of titles requires, that the doctrine should stand at what it is.

PER CURIAM.—JUDGMENT REVERSED.

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John Mingus v. Edley Pritchet.

A bond for the delivery of specific articles can be discharged only by a delivery or a tender on the day specified. If they are cumbrous, the obligor may notify the obligee to appoint a place for their delivery, and if the latter neglects to attend, upon the plea of tender, the obligor must prove, that he was there ready and able to make the delivery.

This was a warrant upon the following instrument;

"On or against the 1st of March 1829, I promise to "pay *John Mingus* forty two dollars seventy-five cents, "to be discharged in good trade for value received, wit- "ness my hand and seal, &c."

Upon the trial before his Honor Judge Martin, at Macon, on the last circuit, the defendant relied upon the plea of tender, and proved that the 1st of March 1829 was Sunday—that on the Friday preceding, he gave the plaintiff notice to attend on the next day at the plantation of the defendant—that the plaintiff refused to attend on Saturday, and proposed Monday for making the payment, which was refused by the defendant. He then offered to prove, that he had written the plaintiff that payment should be made on Monday. But the judge refused to admit evidence of the contents of the letter, unless notice to produce the letter itself was proved. The defendant then proved, that on Monday the 2d of March, he called upon two of his neighbours to value corn and bacon to the amount of his obligation, and that on the same day he notified the plaintiff of that valuation, who refused to receive the articles at the price at which they were valued.

The jury, under the instructions of his Honor, returned a verdict for the plaintiff, and the defendant appealed.

No counsel appeared for either party.

Ruffin, Judge.—The tender proved in the case is too late, according to the covenant; being the day after it fell due. If an agreement of the parties to that effect would have enlarged the time, yet there is no such agree-

ment here. The plaintiff proposed to take payment on Monday; but the defendant objected. He says he afterwards assented, and wrote to the plaintiff. But there is no proof of that; as the evidence offered upon that point was properly rejected, for the reason given by the judge.

If, however, the defendant was prevented by the act of the plaintiff from making the tender at the proper time, or discharged from it, then he shall be excused, and considered as having duly made it, provided he shows that he was able *and* ready to make it. Altho' the covenant does not specify the kind of *trade*, it may be taken in favor of the defendant, that the articles were to be cumbrous. In that case he would not be bound to carry them, and tender them to the plaintiff personally, wherever he might be able to find him. But he is bound to give notice of his readiness, and request the creditor to name a place where he will receive them; and when a reasonable place is designated, the debtor is further bound to have the articles there, and if the creditor does not attend to receive them, he, the debtor, must show that he was there ready to deliver at the day. (*Co. Litt.* 210.)

Here the plaintiff may be considered as appointing the defendant's plantation as the place, because he did not object to it when proposed. But nothing occurred to discharge the defendant from a tender, at that place, on the day specified in the contract. It is true, the plaintiff did not attend on Saturday nor Sunday, or fix upon any other time; but that does not dispense with a tender then and there by the debtor, or rather, with proof of his ability and willingness to tender. Here there is no evidence, that the defendant was himself at home on either of those days; or had any of the articles, which were afterwards valued and set apart for the plaintiff; or indeed any other sufficient thing to satisfy his bond.

PER CURIAM.—JUDGMENT AFFIRMED.

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CALEB SPENCER, *adm'r. of* JEREMIAH GIBBS
v.
WILLIAM CAHOON.

In an action by an administrator, for an injury done to his intestate, after a plea in bar, the defendant cannot impeach the grant of administration.

DETINUE, for sundry slaves, originally brought by *William R. Gibbs*, as the administrator of *Jeremiah Gibbs*. The defendant, at the return day of the original writ, entered his appearance, and pleaded *non detinet*, and the statute of limitations; upon which issue was joined. At a subsequent term, the death of *William R. Gibbs* was suggested, and the plaintiff came into court, and was made a party under the act of 1824 (*Taylor's Rev. c.* 1247) as administrator *de bonis non* of *Jeremiah Gibbs*.

On the trial, before his Honor Judge STRANGE, at Hyde, on the last circuit, it was objected, by the defendant, that neither *William R. Gibbs*, nor the plaintiff, ever were administrators of *Jeremiah Gibbs*; and he produced the record of the County Court, at November term, 1816, appointing *Stephen Gibbs* administrator of *Jeremiah*.

The plaintiff proved, that *Stephen Gibbs* and his sureties, upon his appointment, had only signed and sealed a bond in blank; he also proved his own appointment and qualification at August term, 1830, of the County Court. His Honor, upon these facts, nonsuited the plaintiff, who appealed.

No counsel appeared for the plaintiff.

Gaston, for the defendant, cited *Hoskins* v. *Miller* (*ante* 2 *vol.* 360).

RUFFIN, Judge.—The plaintiff was nonsuited, because "he was not the *true* administrator" of *Jeremiah Gibbs*; and it has been argued here, as if that was the only point in the case, and as if it depended on the validity of the previous administration granted to *Stephen*. Such would have been the case, had issue been taken on the plaintiff's character by plea in abatement, or demur

rer, instead of the defendant pleading in bar. Where indeed an administrator sues on his own possession, he does not make *profert* of his letters, but shows them on the trial as his title. Their validity may then be disputed, because that is the first opportunity of contesting them given to the defendant. But this suit is brought by the administrator in that character, and is revived by the administrator *de bonis non*; and must be taken to be on the intestate's possession. The plea of *non detinet* admits the administration, and that it was duly taken. It can never afterwards be brought into dispute in that action. This goes to the character of *Wm. B. Gibbs* who brought the suit. But the same principle applies equally to the character of the present plaintiff; who is made a party under the act of 1824. It is true, that when a plaintiff dies, no process is necessary to make his representative a party; nor is any plea given to the defendant to put the administration in issue. The party is admitted on motion. He must then show his right, and the defendant, who is kept in court two terms, must then state his objections. When the administrator is once made a party, the defendant is concluded. (*Anonymous* 1 *Hay.* 455, *McNair* v. *Ragland*, 1 *Devereux' Equity Cases* 533.) If indeed the court has been surprized or deceived, the power, not less than the disposition, exists to correct it. But it cannot be done by a nonsuit on the trial of an issue in bar. A motion, founded on a proper case, brings it directly before the court. And here there seems to be no ground for it; because there seems to be no dispute about the issuing of the letters to *Spencer*, founded on those admitted by the plea to have been granted to *William B. Gibbs*, who instituted the suit; which, I repeat, must here be taken to have been on a detention from the first intestate.

Where an administrator seeks to revive a suit commenced by his intestate, the defendant may, by motion, put the administration in issue.

It cannot however, be impeached as a ground of nonsuit at the trial.

If indeed the question was upon the title of the defendant, as being derived from *Stephen*; or as being good under the act of 1820 (*Rev. c.* 1055) by reason of an adverse possession without suit by *Stephen*, then the validity of the administration of *Stephen* would be a material question. And this would certainly be a compe-

But where the defendant claims title by a grant of administration, previous to that of the plaintiff, or relies on his possession

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tent inquiry, so far as it did not conflict with the admission of the plaintiff's character stated in the declaration, and admitted by the plea in bar—namely, that he was duly administrator at the bringing of the suit, or when he became a party. If the defendant could show a previous administrator, though he was irregularly appointed, and though for that cause, his letters had been repealed, under whom the defendant claimed by purchase; or against whom he held while he could sue; that would be admissible. For this is not a denial of the plaintiff's character; but admitting it, shows a distinct bar. Such however does not appear to be the case here; for no connexion is stated between the defendant and *Stephen*, nor any possession against him. The only question seems to have been upon the validity of the plaintiff's letters; which were taken to be invalid, because others had been granted to *Stephen Gibbs*. That was a point, into which the defendant had precluded himself from inquiring.—The nonsuit must be set aside, and a new trial granted.

Against the first administrator, he may, upon the general issue, prove the first grant of administration; because this is in avoidance of the plaintiff's title.

PER CURIAM.—JUDGMENT REVERSED.

DEN *ex dem. of* JAMES W. MORGAN
v.
WILLIAM MCLELLAND.

A voluntary conveyance to a child, made by an insolvent, is *ipso facto* void, as to pre-existing debts.

EJECTMENT, in which the lessor of the plaintiff claimed as purchaser at a sheriff's sale, under an execution against *John McLelland*, for a default in the discharge of his duty in the office of sheriff of Cabarrus, which he resigned in April, 1823. The defendant claimed title under a deed from the same *John McLelland*, who was his father, executed in July, 1823.

There was contradictory evidence as to the consideration, upon which the deed to the defendant had been executed. It was proved that *McLelland*, the elder, died in the year 1824, insolvent.

His Honor Judge MARTIN, at Cabarrus, on the last circuit, left the question of the consideration paid by the defendant to his father, to the jury; and instructed them, that if the deed was voluntary, it was of itself a fraud upon creditors. A verdict was returned for the plaintiff, and the defendant appealed.

No counsel appeared for either party in this court.

RUFFIN, Judge.—The instruction, that the deed from the father to the son, if voluntary, was fraudulent and void as against the creditor, under whose execution the lessor of the plaintiff purchased, is the only point in the charge of the court, to which exception is taken.

The debt was antecedent to the settlement—being for a default in the office of sheriff, which was resigned in April, 1823, and the deed being executed in July following.

The position thus laid down by the judge, in a case like this, cannot admit of a question. It ought not to be brought into doubt for a moment. Under statute 13 *Eliz.* debts subsequently contracted by one who had made himself insolvent, by a previous voluntary conveyance immediately before, have been protected, upon the ground, that the deed was made with the view to become indebted. But the common law always preserved existing rights. (*Upton* v. *Bassett*, *Cro. Eliz.* 444.) And it has always been true, that a conveyance, by one indebted at the time to the extent of insolvency, even to a child who pays no price, or one altogether inadequate and colorable, was void as against pre-existing debts. Every eminent judge, who has sat either in courts of law or equity, for more than two hundred years past, has had occasion to say so, and has said so. A gift by a person, unable to pay his debts, so directly and inevitably tends to delay and hinder the creditor, and so plainly violates the first moral duty—honesty—that the least regard to fair dealing and integrity imposes it upon the court to pronounce it void. It must be so, if creditors are to have any security for their debts beyond the mere will of the debtor. Such a transaction is not to be looked on

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only as a means by which the intent to defraud may be inferred by a jury: it *must* be. The act is altogether incompatible, and irreconcilable with a contrary intent. It is an act of fraud, in itself. Whether the deed was, in point of fact, voluntary or not, was properly left to the jury.

PER CURIAM.—JUDGMENT AFFIRMED.

SETH SUMNER *executor of* JAMES SUMNER

v.

JAMES WHEDBEE.

Counsel fees paid by an executor in a suit brought against him, in which he was successful, cannot be recovered in an action on a bond, conditioned to exonerate him from liability on account of his executorship.

DEBT on a bond, executed by one *John Sutton*, as principal, and the defendant as surety. The plaintiff, in his declaration, assigned a breach of the following condition: "that if the said *John Sutton*, &c. do release, exonerate and discharge, in every way, manner and form, the said *James Sumner*, his heirs, executors and administrators, from the executorship to the will of *Granbury Sutton*, deceased, in as full and ample a manner as if he had never qualified thereto, then this obligation to be void, otherwise, &c." It appeared in proof, that after the execution of the bond, one of the legatees of *Granbury Sutton* filed a bill in Equity against *Seth Sumner*, executor of *James Sumner*, for an account of the estate of *Granbury Sutton*, which was finally decided in favor of the defendant (1 *Dev. Eq. Cases* 338). It was admitted on the trial, that the legal costs of the suit had been paid by the present defendant; but it further appeared that the plaintiff had paid, in addition to the taxed fees, $215 to counsel, for services rendered in that cause. NORWOOD, Judge, charged the jury, that if the fees paid to the counsel were reasonable and customary, the

facts in proof amounted to a breach of the condition. A verdict was returned for the plaintiff, and the defendant appealed.

The case was submitted, without argument, by *Hogg*, for the plaintiff, and *Gaston*, for the defendant.

HALL, Judge.—It does not appear to me, that the suit brought by the legatee of *Granbury Sutton* against *James Sumner's* executors, which was decided against the plaintiff, was any breach of the condition of the bond, on which the present suit is brought. The condition is, that "the plaintiff's testator should be released, exonerated and discharged, in every manner and form, from the executorship of *Granbury Sutton*, deceased, in as full and ample a manner, as if he had never qualified thereto." I should not think that a breach of that condition would be committed, if a third person should bring a wrongful action against *James Sumner*, as executor of *Sutton*, and have the suit decided against him; but that the condition was only intended to protect the executor, *James*, against any recoveries which might be made against him. It is unnecessary, however, to decide this part of the case. The parties seem to have given it a more liberal construction; because it appears, that the costs of the suit of the legatee against *James Sumner's* executor, were paid by the defendant in the present suit. And how that happened does not appear; as that suit was dismissed at the plaintiff's costs. Be that as it may, the present suit is brought for two hundred and fifteen dollars, extra fees, paid to counsel by the defendant in the same suit. If, according to the construction which the parties seem to have given to the condition of the bond, the condition extended to wrongful suits which might be brought against the executor, and also to costs which he might be bound to pay, it surely cannot extend to voluntary costs of his own creating. When the defendant in this suit paid the legal costs, he went as far, as by any fair construction of the condition of the bond, he was bound to go.

Per HALL, J. The costs of a suit brought against the executor, which was decided in his favor, cannot be recovered in an action on such a bond. To constitute a breach, there must be a recovery against the executor.

PER CURIAM.—JUDGMENT REVERSED.

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JOHN BRANCH, *for the use of* THE BANK OF CAPE FEAR
v.
ALEXANDER ELLIOT *et al.*

Bonds given by officers for the faithful discharge of their duty, which do not conform to the act requiring them, can only be enforced according to the rules of the common law; and a bond given by a sheriff, in a penalty greater than that required by the act of 1777 (*Rev. c.* 118) is not within the provision of that act, authorizing successive suits on sheriff's bonds, and is extinguished by the first judgment thereon.

The cases of *The Governor* v. *Witherspoon* (3 *Hawks* 42) *Governor* v. *Matlock* (2 *Hawks* 366) and *McRae* v. *Evans* (*ante* 2 *vol.* 383) approved by RUFFIN, Judge.

DEBT, upon a penal bond, executed by the defendants, as sureties for one *John McRae*, sheriff of Cumberland, tried before his Honor Judge NORWOOD, in that county, on the spring circuit of 1830.

The only plea relied on by the defendants was that of a former recovery—and a verdict was taken for the plaintiff, subject to the opinion of the court on the following case:

The bond was for £5,000, payable to "his Excellency *John Branch*, Esquire, Governor, &c." but not being taken according to the directions of the act of 1777, (*Rev.* c. 118) the writ was "to answer *John Branch*, Esquire," and not in the name of his successor. A suit had been brought on the same bond in Cumberland County Court, a copy of the record of which was attached to the case. The writ was "to answer *John Branch*, Esquire, Governor, &c. to the use of *Edward McKay*," and a verdict was returned for the plaintiff, but no formal judgment had been rendered. A suit had also been instituted on the same bond in Cumberland Superior Court, in the name of "*John Branch*, Governor, &c. to the use of *Cameron* and *Baker*;" in which the case stated, that judgment had been rendered for the plaintiff —the jury did not expressly find the amount of the penalty, but only assessed the damages sustained by the relators.

Upon these facts, his Honor set the verdict aside, and directed a nonsuit to be entered, and the relators appealed.

Hogg, for the relators, contended, that distinct actions might be brought upon official bonds, for every default which should occur, and this without the aid of the provision contained in the act of 1777; and urged that a contrary rule would lead to great absurdity and inconvenience. He cited *State Bank* v. *Twitty* (2 *Hawks* 1) *Governor* v. *Matlock* (*do.* 366) *Governor* v. *Witherspoon*, (3 *do.* 42).

Badger, for the defendants, argued that the rule that a bond is extinguished by a judgment upon it, was well settled, and was not a rule of practice which could be altered in the discretion of the court.

RUFFIN, Judge.—Repeated decisions of this court have established that such bonds, as that sued on here, not being taken in conformity to the act of 1777 (*Rev.c.* 118) cannot be proceeded on in the manner prescribed by that statute. The *State Bank* v. *Twitty*, (2 *Hawks* 1) is a leading case; and that has been followed by others. Those decisions relate emphatically to the remedies on such bonds. It shall not be summary: it shall not be by the successor: nor by an assignee. By consequence, *successive actions* (given by the act of 1777, on bonds taken according to it) cannot be sustained. Were it *res integra*, the court would at this day be much disposed, and probably would hold, that since the bond imposes no duty on the officer which the law itself did not, and was voluntary entered into, it might be enforced by the remedies of the statute, tho' made for a larger sum than required by law. But the question is considered as closed; and this the more especially, because it does not affect rights, but only the method of proceeding.

The remedy being at common law, or rather under the general law, and not under the particular statute of 1777, it is perfectly certain that the present action is barred, if judgment has been rendered on the bond in a

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former suit. For *Mr. Branch* alone can be taken notice of, as the plaintiff, without reference to those for whose use he sues.

It seems, this bond has, in point of fact, been sued on twice before: once in the County Court; and a transcript of the record of that suit forms a part of this case; and again, in the Superior Court.

Various objections are taken to the record from the County Court, to show that there was no judgment in that proceeding. It is unnecessary to consider them, because the case states, that "a *judgment was rendered* in the Superior Court on the same bond, at the suit of *John Branch*, to the use, &c. against these defendants."

In debt on a bond, the verdict need not state its amount.

The effect of that judgment there was an attempt to repel, upon the ground that the penalty of the bond was not expressly found by the jury; and so, there was no judgment *therefor*. The objection is untenable. If *non est factum* be not pleaded, the execution of the bond, *as described in the declaration*, is admitted; and so the amount appears on the record. If it be pleaded, the verdict, that *the bond declared on* is the deed of the defendant, finds the amount. The penalty need not be otherwise found; for it enters into, and can enter into no other issue.

The bar to the present action then is complete; and the judgment below must be affirmed.

The rule adopted in this court respecting official bonds, which do not conform to the act requiring them disapproved, but followed by RUFFIN, Judge.

Inconveniencies may arise out of the doctrine heretofore established, which may require the interposition of the legislature: such as the refusal of the obligee to put, or suffer the bond to be put in suit; or a collusive verdict for the obligors. Those inconveniences this court cannot correct. It is for the wisdom and power of the General Assembly to do it, by extending the statute remedies to such bonds, if thought right. Happily for the purposes of justice, the bar to this action is not destructive of the relator's rights, and does not extend beyond the costs of this suit. For while the cases, before alluded to, determine that the remedies cannot be under the statute, they have also determined the bond itself to be good at common law. It is available, not only for

But although a judgment upon such bonds is a bar to a second suit, if the bond is within the stat. 8 & 9 *Wm.* 111, the relator may

damages sustained by the obligee himself, by a breach of duty within the condition, but also for similar damages sustained by any other person: in fine, the obligee is a trustee for persons injured. There can, then, be no difficulty touching the remedy in this case. If the bond be without the statute 8 and 9 *Wm.* III, *c.* 11, execution may be taken out at the risk of the party on the old judgment, and the defendants forced to seek relief, as before that statute, in equity. If the statute extends to such bonds, then a *scire facias*, suggesting other breaches, may be sued out, and prosecuted, as in other cases. For this general doctrine, I refer to the cases of the *Governor* v. *Matlock* (2 *Hawks* 3 6) *Governor* v. *Witherspoon* (3 *Hawks*. 42) and particularly to the *Governor* v. *Evans* (*ante* 2 *vol.* 383).

have a *sci. fa.* suggesting other breaches—or if not within that statute, execution may issue at his risk, leaving the defendant to seek relief in equity.

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN COX *et al.* v. BENJAMIN DELANO.

An agreement between the owner of a vessel and the captain, that each party should pay certain expenses, and divide the freight, with a power to the captain to invest it on joint account, constitutes a co-partnership.

ASSUMPSIT, tried before NORWOOD, Judge, at Chowan, on the last fall circuit.

The only question necessary to present, was, whether the following agreement made the defendant a partner of *Samuel Whelden*: "Memorandum of an agreement "by and between *Benjamin Delano*, of, &c. and *Samuel* "*Whelden*, of, &c. The said *Delano* agrees to let a "schooner to him belonging, called, &c. of the burthen, "&c. to the said *Whelden*, upon condition as follows: "said *Whelden* to pay all charges of victualing and "manning, together with all other charges which may "arise on said schooner, as long as he shall have pos-"session of her, excepting such as are hereafter enume-"rated, which are to be paid by the said *Delano*, viz.

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"one half the expenses of port charges, one half the ex-
"pense of lights used on board, and the wages of one
"seaman. The said *Whelden* is to return the schooner
"at the expiration of six months, in like good order as
"delivered, excepting, &c. The said *Whelden* is hereby
"empowered to invest the proceeds of freight in such
"merchandize, as he may think for mutual interest.
"All profit, over and above the expenses above menti-
"oned, to be equally divided."

The presiding judge, thinking that this agreement constituted a partnership between the defendant and *Whelden*, a verdict was returned for the plaintiffs, and the defendant appealed.

Hogg, for the defendant, cited *Dixon v. Cooper* (3 *Wilson* 40) *Benjamin* v. *Porteus* (2 *H. Bl.* 590) *Dry* v. *Boswell* (1 *Camp.* 327) *Wilkinson* v. *Frazier* (4 *Esp.* 183. *Reynolds* v. *Topham* (15 *Mass.* 370).

Gaston, for the plaintiffs, referred to *Abbott on Shipping*, c. 1.

HENDERSON, Chief-Justice.—He who shares in the profits, which are nothing but the net earnings, should also share in the losses, if there be any. The moral right of making gains is based upon this principle. The rule is easily laid down; the difficulty is in its application. Where a part of the profits themselves *is the property* of the party, he is then a partner. Where their amount merely ascertains the amount of a debt or duty, but they themselves do not *belong* to the party, there it is not a partnership. Were there no special contract, but the case rested on the facts, part of the earnings would be the property of the defendant. The vessel was his; he bore part of the expense of navigating her. *Whelden* gave his services, and the residue of the expense. Independent of express agreement, the profits would go according to the value of that which produced them; that is, according to the productive value of the stock. In what particulars has the agreement of the parties varied the case? It has only fixed the ratio of division, by declaring that each party shall have one

One who receives a portion of the profits, as his property, is a partner; but it is otherwise if the amount of profits is referred to, only to ascertain the amount of a debt due him.

half of the profits, that is, that *Whelden*, who was to act as master of the vessel, was to pay over one half of the freight she carried, to the owner. These expressions, altho' in form somewhat like making it a debt, do not vary the case; for they arise from the fact, that the freight was in the first instance to be received by him who acted as master. In truth he was to receive and divide, and even pay.

But there is in this contract a clause, which I think puts the matter to rest, to-wit, "the said *Whelden* is hereby empowered to invest the proceeds of freight in such merchandize, as he may think proper for mutual interest." If a part of the freight was not the property of *Delano*, why was his consent necessary to invest it in merchandize; or why should he direct about it, if the whole was a mere contract of hiring, and the earnings referred to, merely to fix the price to be paid. It is nothing more than this: *Delano* furnished the vessel, and was to pay part of the expense of navigating her. *Whelden* was to act as master, and pay the balance of the expenses. Freight was to be sought, and profits made with this combined stock. A loss has been incurred. They who were to reap the profits, must bear the loss.

PER CURIAM.—JUDGMENT AFFIRMED.

JONATHAN HAINES, *upon the relation of* THOS. D. KELLY,

v.

DAVID DALTON, *ex'r. of* ISAAC DALTON *et al.*

In a warrant against an administrator, judgment was rendered that the plaintiff recover his debt and costs, and then an entry made that the defendant "pleads retainer, fully administered, &c." *It was held*, that the justice had power to try those pleas—that he had negatived them—that the judgment was absolute, and that the non-payment thereof might be assigned as a breach of the administration bond.

DEBT, upon an administration bond, executed by the defendant's testator, upon a grant to him of adminis-

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tration upon the estate of *Jonathan Dalton*. The bond was in the usual form, and after *oyer*, the defendants pleaded *non infregerunt conventionem*—and performance.

On the last circuit, at Surry, the case was submitted to his Honor Judge MARTIN, upon the following facts, in the form of a case agreed.

The day the defendant's testator took out administration upon the effects of *Jonathan Dalton*, the relator *Thomas D. Kelly* sued out several warrants against him, which were all brought either upon notes of the intestate, or upon former judgments rendered by justices of the peace against him. On the day after, the justice before whom the warrants were returned, gave judgment upon them, and entered up those judgments in the following manner: "The plaintiff, on a note proven by W. C. B. "obtains judgment for fifty dollars, and interest from, "&c. and costs. Before me."

"The defendant pleads retainer for his own debt, "former judgments fully administered, no assets to sa- "tisfy the plaintiff's demand."

"J. W. Justice."

About twenty days after the date of these judgments, the defendant's testator sold personal property of his intestate, to the amount of $10,000, which he disbursed in satisfaction of judgments subsequently rendered against him, and upon notes of his intestate.

Upon these facts, his Honor entered up judgment for the relator, and the defendant appealed.

Nash, for the defendant, cited *Mara* v. *Quin* (6 *T. R.* 1) *Mary Shipley's case* (8 *Rep.* 134, *a.*) 2 *Chitty* 638 *Gregory* v. *Haughton* (*ante vol.* 1, 443).

No counsel appeared for the relator.

HENDERSON, Chief-Justice, after stating the case as above, proceeded: The question submitted is, was the administrator guilty of a *devastavit* in paying the judgments subsequently rendered against him? We think that he was.

If justices were bound to state the facts, which they find to be true or false, and on which they render their

In reviewing a judgment rendered by a justice of the peace, every fact necessary to support it is to be taken as found, unless the contrary appears.

judgments, very few of them could be sustained. We therefore take it for granted, that every thing is found by them which is necessary to support their judgments, unless the contrary appear. The justice having rendered judgment on these warrants, the legal presumption then is, that he found every fact necessary to support him, and that he negatived every plea which was a bar to the plaintiff. We therefore conclude, that he found all the pleas in relation to the assets to be false, or enough of them to be so, to warrant the judgments. For the practice of not enquiring into the truth of those pleas appears to me to be very strange, notwithstanding it is said to have prevailed in New-York, and in some parts of this state. It is very strange, that a court should possess the power to hear and to decide on the matter of charge, and have no power also to hear and decide on the defence. The proposition to my mind borders on the absurd; with much deference I speak it. I must therefore conclude that in law, whatever may be the fact, the pleas were then passed on by the justice, and found to be untrue; that it was found that the defendant's testator had assets; and the judgment not having been paid, the condition of the bond is therefore broken.

A justice of the peace can try the truth of any plea, which if sustained, would bar an action within his jurisdiction.

But take it in the most liberal manner, suppose that the pleas were not passed on, that by law it was beyond the power of the justice to pass on them, they must be passed on by some tribunal, and the plaintiff must have the benefit of the fact, if the defendant had assets; and suppose further there was no tribunal, appointed by law, to try that fact—and I presume the parties knew there was none, unless it was the justice of the peace—the plaintiff should have the right in the present action of showing it. In this point of view he is clearly entitled to charge the defendant now, unless it can be shown that the judgments are judgments *quando*; and they bear no resemblance to such judgments. The facts are against such presumption; for it cannot be readily supposed, that the plaintiff would exonerate the $10,000, then in hand, and look out for the future assets, when he com-

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menced his suit on the very day on which administration was granted; and there was sold in twenty days $10,000 worth of assets. So take it either way, there is a breach of the bond.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem. of* JAMES MCK. ONEAL *et al.*

v.

JOHN E. BUTLER.

If an action of ejectment be referred to arbitrators, an award, stating the cause to be pending between the lessor of the plaintiff and the tenant in possession, without noticing the fictitious parties, is sufficient.

EJECTMENT, and after not guilty pleaded, the cause was referred to arbitrators, who made the following award:

"We, the undersigned, to whom was referred the "several matters of controversy, now pending in the "court of law and court of equity, for Burke, between "*James McK. Oneal*, &c. (the other lessors of the plain-"tiff) and *John E. Butler*, do award that *John E. Butler* "hold the tract of land, as set forth in the declaration in e-"jectment. And likewise, &c." The award then disposed of a suit in equity between the same parties.

The lessors of the plaintiff excepted to this award:

1st. Because it did not set forth the parties to the suit, they being *Den* on the demise of *James McK. Oneal* and others v. *John E. Butler*.

2d. Because the award did not conform to the submission, or the rule of reference.

3d. Because the award was void for uncertainty.

His Honor Judge MARTIN, on the last circuit, set aside the award, and the defendant appealed.

No counsel appeared for either party in this court.

HENDERSON, Chief-Justice.—The first exception goes to a mere matter of form. We think it should be dis-

allowed, for we cannot but know, that the lessor of *John Den* is the party complaining, and that *John Den* is a fictitious person, used for the purpose of bringing the merits before the court; we must also know that the tenant in possession is the substantial defendant, and that *Richard Fen* is likewise a fictitious person, introduced as the defendant, for the same reasons that *John Den* is made plaintiff. We think the award is made in the suit submitted. This disposes of the first and second exceptions; for they are substantially the same, presented in different forms.

We cannot perceive any uncertainty in the award, to sustain the third exception.

The judgment must be reversed, and judgment according to the award entered for the defendants. We should also confirm the award in the suit in equity between the same parties; but the papers are not sent up, or not a sufficiency of them to enable us to form a decree.

PER CURIAM.—JUDGMENT ACCORDING TO AWARD.

PETER ARRINGTON v. GIDEON BASS *et al.*

The defendant in a *ca. sa.* bond, given under the act of 1822 (*Rev. c.* 1131) is bound to attend at every term until the cause is finally disposed of.

The defendant *Bass* was arrested upon a *ca. sa.* and gave bond under the act of 1822 (*Taylor's Rev. c.* 1131) for his appearance at the August term, 1829, of Nash County Court. At that term, the following entry was made in the cause: "Continued, upon cause shown by the defendant." At the ensuing term, upon a default by *Bass*, judgment was rendered against the defendant and his sureties "now as of the last term;" from which the defendants appealed.

On the last circuit, his Honor Judge MARTIN reversed the judgment of the County Court, and the plaintiff appealed.

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COWLES v. OAKS.

Devereux, for the plaintiff.
Badger, contra.

HALL, Judge.—The first notice we have of this case is at August term, 1829. At that term the case was continued upon cause shown by the defendant *Bass*; and the court by the act of 1822 (*Rev. c.* 1131) had the power to continue it upon sufficient cause shown. Suppose for instance, that owing to some unavoidable accident, the defendant had it not in his power to prove, that he had given ten days notice to his creditors or their agents, or attorneys, of his intention to avail himself of the benefit of the act: the court could not do otherwise than grant a continuance. At November term, judgment was given against the defendant; and nothing illegal appears in that. The reason why it was entered *nunc pro tunc*, is not obvious. But certainly they ought to have given judgment, because it does not appear that the defendant *Bass* then made his appearance, or caused it to be entered. The bond which he gave for his appearance was as obligatory on him to attend then, as at the preceding term when the continuance was granted at his instance. (*Mooring* v. *James*, *ante* 2 *vol.* 254.) And as he did not enter his appearance at the subsequent term, judgment against him was the legal consequence.

A judgment *nunc pro tunc* is not erroneous, altho' it appear that it should have been as of the present term.

PER CURIAM.—JUDGMENT REVERSED.

JOSIAH COWLES v. THOMAS J. OAKS, *adm'r.*

In a proceeding on a garnishment, under the act of 1793 (*Rev. c.* 389) it is unnecessary for the plaintiff to reply to the answer of the garnishee on oath, where the garnishment admits the possession of property received from the defendant, but sets up a distinct title.

The plaintiff sued out an attachment in the County Court against one *Alexander Rea*, and summoned as garnishee the defendant's intestate; who stated in his affidavit, that he had no effects in his hands belonging to *Rea*, but that he had received of *Rea* several an-

ticles of property, specifying them and their value, in discharge of a debt due to himself. The plaintiff replied, and an issue was made up, which was found in favor of the plaintiff, and the defendant appealed to the Superior Court, where a verdict was again returned for the plaintiff, before his Honor Judge SWAIN, at Rowan, on the last circuit. After verdict, the defendant's counsel moved to dismiss the proceeding, upon the ground that the plaintiff had filed no affidavit, denying the truth of the defendant's answer, and also in arrest of judgment. Both motions were overruled, and the defendant appealed.

The case was submitted without argument, by *Gaston*, for the plaintiff, and *Nash*, for the defendant.

HALL, Judge.—The first objection in this case is, that the plaintiff filed no affidavit, denying the truth of the answer of the defendant's intestate upon his garnishment. The act of 1793, (*Rev. c.* 389) which governs this case, declares, that when the garnishee shall deny that he or she owes to, or has property in his or her hands belonging to the defendant, and the plaintiff in the attachment shall on oath suggest, that the garnishee owes to, or has in his or her hands property belonging to the defendant, then, &c. The act further declares, that when the garnishee makes such a statement of facts, that the court before whom such garnishment shall be made, cannot proceed to give judgment thereon, then the court shall order an issue to be made up. The plaintiff's oath seems to be necessary, in order to induce the court to proceed further, when the garnishee either positively denies that he owes the defendant any thing, or has in his hands any property belonging to him. The garnishment, in the present case, was not of that precise kind. The garnishee states, that he owed the defendant nothing, but that he had property in his possession which he received from the defendant, but which he received in discharge of a debt due to himself. So that the plaintiff's affidavit was not necessary to induce the court to go farther. The only question was, who had a right to the property, the defendant or the garnishee. It was such a statement of facts made by the garnishee.

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that the court could not proceed to give judgment without the intervention of a jury; and they proceeded to impannel one, as the act directs. But suppose the plaintiff's affidavit was necessary; no objection for the want of it was made, when issue on the garnishment was joined. And after the verdict in the Superior Court, for the first time, exception is taken to the proceedings, for want of that affidavit. I think there was nothing in it, either to induce the court to dismiss the proceedings or arrest the judgment.

PER CURIAM.—JUDGMENT AFFIRMED.

OWEN HOLMES *et al.* v. JOHN H. HALL *et al.*

A mortgagor of a chattel, having the right of possession for a stipulated period, cannot, after the expiration of that period, dispute the title of the mortgagee, and the same rule applies to his vendee.

DETINUE, for a negro, tried on the last circuit, at New-Hanover, before his Honor Judge DANIEL. The plaintiff's claimed title as follows: The slave in dispute had belonged to one *James Saltar*, who had died intestate; and administration upon his estate had been committed to one *Locke*; *David J. Melvin*, who married a daughter of *Saltar*, had mortgaged the whole of his interest in the estate of *Saltar* to the plaintiffs. The mortgage deed contained a stipulation that *Melvin* should retain possession for five years, which was the period limited in which the mortgage debt was to be repaid. This mortgage was duly proved and registered. The defendants claimed under *Melvin* by a subsequent purchase, and proved that after the execution of the mortgage to the plaintiffs, by an order of the County Court of Bladen, where *Saltar* lived, a division of his slaves took place, when the slave in dispute was assigned to *Melvin*, and was delivered to him by *Locke*. This order was made without filing a petition, and there was no judgment of the court confirming the division.

After the expiration of the five years, during which, by the terms of the mortgage deed, the slave was to remain in *Melvin's* possession, he being then in that of the defendant, the plaintiffs made a demand of him, and upon a refusal, instituted this suit. For the defendants it was contended, that at the execution of the mortgage, *Melvin* and wife had only an equitable interest in the estate of *Sultar*, and consequently that the plaintiffs acquired no legal title thereby, and that the division being irregular, did not vest a legal title either in the plaintiffs or *Melvin*. But the presiding judge thinking, that as the slave was delivered to *Melvin*, as a part of his distributive share in the estate of *Sultar*, *Melvin* must be considered as holding him by the permission of the plaintiffs; and as he, after the expiration of the time limited for the payment of the mortgage debt, could not dispute the title of the plaintiffs, so neither could the defendants.

A verdict was returned for the plaintiffs, and the defendants appealed.

No counsel appeared for either party in this court.

HENDERSON, Chief-Justice.—What would be the effect of a payment by the administrator to a distributee, after an assignment by the distributee, and notice thereof to the administrator, does not arise in this case. For this action affirms the delivery of the slave in question to the distributee, and claims the benefit thereof. Nor need we examine the regularity of the proceedings of the County Court, in ordering a division of the intestate's estate; for both the plaintiffs and defendant claim under it. In fact, the delivery of the slave by the administrator, no matter whether the court had jurisdiction or not, or whether the petition and order for a division were regular or irregular, passes the property. It is true, a case might arise, where a delivery was made in pursuance of an irregular or invalid order for a division, and under an impression that such order was compulsory on the administrator, which might afford grounds to set aside and annul the delivery, as being made under a mistake.

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But that is not this case. For these reasons, we deem it unnecessary to enter into the question, whether the court had jurisdiction, or whether the proceedings were regular; but found our opinion upon the effect of the delivery of the slave in question to *Melvin*, as his wife's portion, in whole or in part of her father's estate. The only remaining question is, what was the effect of that delivery on the then state of facts, with the subsequent demand of the slave, and the commencement of this suit.

We are all of opinion with the presiding judge, that *Melvin*, the husband, received the slave in question, as mortgagor, for himself and his mortgagees, according to their respective rights; and that he continued to the time of his sale to hold him in that character; and that the defendants coming in under him, with notice of the mortgage, either express or implied, (for the mortgage was duly registered,) held the slave until the demand, in the same manner. We do not fully understand what is meant in the argument appearing in the case, that a distributive share of an intestate's estate is a mere equity; and that the defendants are purchasers for a valuable consideration. If by it is meant, that a court of equity, or a court proceeding by its forms, is resorted to, to enforce payment or delivery of a distributive share, the position is admitted. For it is true, that the forms of a court of law do not afford an adequate redress, because the right to distribution is of modern date, and was introduced after those forms were settled. But if it is meant, that it is not a right recognized by, and as binding, at law, as it once was, in conscience only, the position is denied. It is a right given by statute, its extent and nature defined, and must therefore be known to, and recognized in courts of law, as a legal right. But if it is a mere equity binding in conscience, the defendants cannot protect themselves from its obligation in the hands of mortgagees. For altho' they allege themselves to be purchasers for value, yet they do not allege that they had no notice of the mortgage. And if they did, it would be disproved by its registration, which is notice to the world. As to the right of the husband to sell or

Courts of law afford no remedy for a distributive share, because their forms were fixed before the right to distribution was given.

But the right being now given by statute, it is recognized in courts of law.

mortgage his wife's distributive share *for value*, I presume that will not be denied.

PER CURIAM.—JUDGMENT AFFIRMED.

WAUGH & ISBELL v. NATHAN CHAFFIN.

A judgment entered up as follows: "Former judgments and retainer admitted; judgment confessed for, &c. to be satisfied when the money is collected, or in notes before hand," is a judgment *quando*.

DEBT, upon three judgments entered up against the defendant, as the administrator of *William W. Chaffin*. The writ demanded "$282 10, which the defendant owes and detains, &c."

Upon *nil debet* pleaded, a verdict was taken for the plaintiff, for $125 75 principal, besides damages—subject to the opinion of the presiding judge upon the following facts:

The plaintiffs commenced actions upon three several bonds against the defendant, as the administrator of *William W. Chaffin*, returnable to November session, 1822, of Surry County Court, to which the defendant pleaded *non est factum*, payment and a set-off, retainer, former judgments, debts of higher dignity, and fully administered. At the next August sessions, the following entry was made in the cause standing first on the docket: "*Non est factum* withdrawn, former judgments and retainer admitted. Judgment confessed for &c. to be satisfied when the money is collected, or in notes before hand if the plaintiffs choose—plaintiffs to pay all costs."

The same entry was made in the other causes, by a reference to that above given, as to the pleas which were admitted; but there was no entry or memorandum, as to the time when the judgments were to be satisfied, and no option given the plaintiffs of receiving payment in notes before they were due.

Afterwards, viz. at November sessions, 1826, three writs of *scire facias* issued upon those judgments, in-

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which, after reciting the judgment, and the fact that it had become dormant, the writ directed the defendant "to appear, &c. and show cause, if any he hath, why "the said judgment should not be revived, and execution "issue thereon." To these writs, the defendant pleaded *nul tiel record*, and the same pleas to protect the assets, which he had entered to the original suit. In the County Court, the following entry was made, "judgment revived according to *scire facias*;" and upon an appeal to the Superior Court, this judgment was affirmed. There was no evidence offered of assets in the hands of the defendants, liable to the plaintiffs' action.

His Honor Judge MANGUM, at Surry, on the last fall circuit, upon these facts, set aside the verdict, and entered a nonsuit, and the plaintiff appealed.

Gaston, for the plaintiff.

The *Attorney-General* and *Badger*, for the defendant.

HENDERSON, Chief-Justice, after stating the case, as above, proceeded: On these judgments, declaring on them in the *debet* and *detinet*, the present action is brought, to charge the defendant personally, without any evidence of assets. And this depends on the question, whether they are absolute or *quando* judgments. The whole entry must be taken together, and if so, it is impossible to make them absolute judgments, or to reconcile the admission of former judgments and retainer, with an absolute judgment. I say nothing of the entry "to be paid when the money is collected," for that entry is made in the first judgment only, and in the other two, the entries in the first are referred to. But I lay it out of the case. As I said before, the admission of the pleas renders it impossible for them to be understood as absolute judgments. If they were not so at first, the revival by *sci. fa.* did not make them so. The revival only authorized execution on them, as their terms originally imported. It simply gave an execution. It is therefore impossible, without evidence of assets afterwards coming to hand, more than sufficient to satisfy the defendant's retainer, and the other judgments referred to in the

An action cannot be sustained against an administrator, to subject him personally, unless he has been fixed with assets.

pleas, to sustain the action. Even with such evidence, I think that the action cannot be sustained, until the defendant is fixed with assets in this cause, either by *sci. fa.* suggesting them, or by some other mode. I speak from recollection only, or rather upon principle, as I have not examined the authorities. But most certainly it cannot be done, as said above, without evidence to charge the defendant with additional assets; in other words, with assets subject to these judgments. As to the objection taken by the defendant, there is nothing in it. The rule is not, that in debt the plaintiff must recover the sum demanded, or not at all; but that the proofs must agree with his allegations. The plaintiff may recover less.

In *debt*, the plaintiff may recover less than he demands, but the proof must agree with his allegations.

PER CURIAM.—JUDGMENT AFFIRMED.

ISHAM A. DUMAS v. ROBERT POWELL *et al. adm'rs.*

To let in secondary evidence, the best evidence of the loss of the original document, that the nature of the case admits of, must be produced.

DEBT, tried before his Honor Judge DANIEL, at Richmond, on the last circuit. The plaintiff declared upon a lost bond, alleged to have been executed by the defendant's intestate. A witness, one *Mask*, testified that he once had a bond in his possession, as assignee, corresponding in date and amount, with that declared on; that he received it from the plaintiff as genuine, and believed it to have been executed by the defendant's intestate, with whose handwriting he was acquainted; that while the bond was in his possession, he presented it to one of the defendants, as a claim which he held against the estate of his intestate; that the defendant was also well acquainted with the handwriting of his intestate, and made no objection, but took a memorandum of the amount; that the witness afterwards, at the request of the plaintiff, returned the bond to him, and

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also a note executed by the plaintiff, and received instead the plaintiff's own note for the amount of both. Another witness, who was present, testified that the plaintiff, on receiving the bond, put it in his pocket, and on their leaving *Mask's* house in company, took out a paper and tore it up. On the part of the plaintiff it was contended, that from this testimony the jury might infer, that the bond was torn up by mistake. But his Honor being of opinion, that there was not such proof of the loss of the bond, as entitled the plaintiff to put his case to the jury, directed a nonsuit to be entered, and the plaintiff appealed.

No counsel appeared for either party.

HALL, Judge.—It is a rule of evidence, that the best which the nature of the case will admit of, must be produced. When that cannot be produced, and the non-production of it is accounted for, the next best evidence in the party's power is required. It is that rule of evidence, which required the production of the bond upon the trial.

In order to dispense with the production of it, it was incumbent on the plaintiff to give all the evidence reasonably in his power, to prove the loss of it. It appears to me, that he is chargeable with two omissions; in the first place, in not having gone to the house of *Mask*, where he tore up the paper the day before, as soon as he discovered the loss of the bond. He might perhaps have discovered some remnants of the paper torn up. In the second place, he might have produced his own note, taken up from *Mask*. It would then appear, that he had not torn up that paper, and tend to a belief, that he had destroyed the lost bond, through mistake, instead of his own. It does not now appear, but that he destroyed his own note, when he took it from *Mask*.

PER CURIAM.—JUDGMENT AFFIRMED.

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DEN ex dem. of RICHARD WALL
v.
ISAAC WHITE and ZACHARIAH WHITE.

A *bona fide* vendee, who pays his purchase money to satisfy an outstanding fraudulent mortgage, and takes a deed from both the mortgagor and mortgagee, is not affected by the fraud.

EJECTMENT, tried on the last circuit, at Rockingham, before SWAIN, Judge. The lessor of the plaintiff claimed title under a judgment against the defendant, *Zachariah*, obtained in 1825, and produced a sheriff's deed for the premises in dispute.

The defendant, *Isaac*, claimed under the defendant, *Zachariah*, as follows: 1st. Under a mortgage made by the defendant, *Zachariah* to one *Bostick*, dated September 15th, 1823, to secure $ 500, with a covenant for a reconveyance upon payment of the mortgage debt within five years. 2d. By a deed of bargain and sale, dated the 9th of October, 1824, by *Zachariah White* and *Bostick* to himself, reciting the mortgage of the latter. Both these deeds were impeached as fraudulent; but it is unnecessary to state the testimony. The defendant, *Isaac*, was in possession.

The presiding judge charged the jury, that if they believed the deeds under which the defendant, *Isaac*, claimed, or either of them, were fraudulent, the plaintiff was entitled to a verdict. A verdict was returned for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant.

Gaston, for the plaintiff.

HENDERSON, Chief-Justice.—Both the mortgage to *Bostick* and the deed to the defendant *Isaac*, were so evidently fraudulent upon the evidence, and therefore void as to creditors, that we hear the proposition of the judge without any startling effect. But if true, it appears to me it may produce the most ruinous consequences. The proposition of the judge in effect is this: A fraudulently mortgages to B. C, without any notice or suspicion,

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that the mortgage was fraudulent, nay, without any knowledge that there was a mortgage at all, purchases the estate from A, fairly and *bona fide*, and within the time of redemption, as in this case. He is then informed of the mortgage, but not of its unfairness; and at the request of A, pays off the mortgage debt, pays the balance of the purchase money to A, and A and B, the mortgagor and mortgagee, join in a deed to him. If this deed be affected with fraud, it must be upon some technical reasoning, beside the merits of the case, which I cannot perceive. The only plausible ground is, that the estate *passed* from the fraudulent mortgagee, and is therefore infected with the fraud, in the hands of a *bona fide* holder. If the premises were correct, I think that the conclusion does not follow. But I believe, upon the strict and technical principles of conveyancing, the estate does not pass from the mortgagee, but from the mortgagor; as I am inclined to believe, that upon payment of the mortgage money within the prescribed time, the estate ceased in the mortgagee, and revested in the mortgagor. For where there is a seisin in one person, to the use of *another*, (I say to *the use of another*—because if a person is seised to his own use, a bare declaration will not change that use,) the use may, by the terms of the conveyance fixing the seisin, change or shift from one person to another; and the seisin, that is the estate, will follow it. By the bargain and sale, the bargainor is seised to the use of the bargainee, by virtue, it is said, of the consideration; but to what extent, whether for years, for life, or in fee, depends upon the declaration of the bargainor, made in the deed; all the use not disposed of remains in the bargainor. For example, if a bargain and sale be made for life or years, the reversion of the use remains in the bargainor. The use for years or life is declared to the bargainee, and the statute carries to it the possession. When therefore, the term for which the use was declared expires, the estate expires, certainly upon an entry—if not *ipso facto* without an entry. If in this case an entry was necessary, and the acknowledging satisfaction of the mortgage debt,

Per HENDERSON, Chief-Justice, *arguendo*. Where the mortgagor and mortgagee join in a bargain and sale before the estate of the latter has become absolute, the bargainee is in under the mortgagor.

and joining with the mortgagor in a conveyance, do not amount to a waiver of an entry, and a surrender of the estate, most certainly the entry of *Isaac White* under *Zachariah's* deed, was sufficient. Because if we resort to the terms of the deed, the mortgage money being paid, and that within the limited period, the mortgagee's estate had expired. He had nothing but a possession, which the entry of *Isaac* put an end to. And the latter having entered, is *in* according to his estate, and having a joint deed from the mortgagor and mortgagee, and the mortgage debt having been paid before the expiration of the time for repayment, his estate is from *Zachariah White*, and not from *Bostick*; even if the estate had been in *Bostick* when the deed was made, for want of an entry to defeat it, and therefore it was the deed of *Bostick*, and only the confirmation of *Zachariah White*, as to passing the estate. When by the entry of *Isaac*, under their joint deed, *Bostick's* estate was put an end to, it then, for the same purpose, became the deed of *Zachariah*, and the confirmation of *Bostick*. To come to a conclusion at once, even if *Isaac* took the estate from *Bostick* under the deed, for want of an entry to defeat *Bostick's* estate, as soon as he did enter under *Zachariah*, the mortgagee's estate vanished, and he then held under *Zachariah*. And I am much deceived, if *Isaac* could support an action, declaring in a seisin under *Bostick*, for his (*Bostick's*) estate no longer existed. If I am right, *Isaac* claims no estate from *Bostick*, and therefore that estate which he now holds, is not infected with the fraud of *Bostick*, if he was not a privy nor party thereto; that is, he is not affected merely by having a deed from *Bostick*; for the interest derived from it, if any, has passed away and ceased.

Where the mortgage debt is paid within the period limited by the deed, the estate of the mortgagee is thereby divested, and he has nothing but a possession, which is defeated by the entry of the mortgagor or his vendee.

In that case, upon an entry by the bargainee of the mortgagee and mortgagor, the bargain and sale becomes the deed of the mortgagor, and the confirmation of the mortgagee.

But however this may be, on strict principles of conveyancing, I think that when we are expounding the contract in reference to the statutes against fraudulent conveyances, we should look upon a mortgage as a bare security for money, and that the mortgagee has an interest or estate for that purpose only; or to speak more properly, an incumbrance to that amount; and that if

In expounding the statutes against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an incumbrancer.

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mortgagor and mortgagee join in a conveyance, when the mortgage money is paid within the time limited, it is the deed of the mortgagor, and the confirmation of the mortgage; at least, it becomes so, immediately upon the entry of the grantee. If the mortgagee puchases the equity of redemption, most commonly he intends to extinguish it, and hold the estate under the morgagor. When the mortgagor pays off the mortgage debt, he intends most commonly to extinguish the mortgage, and hold under his old title. But their deeds may give either character to their acts. I think that in this case, the mortgage was put an end to, and that *Isaac* holds the estate from *Zachariah*; and if that transaction was fair and *bona fide*, he is entitled to hold the land against *Zachariah's* creditors. I repeat, that both these transactions bear the most evident marks of fraud. Yet, for the reasons given, there must be a new trial.

PER CURIAM.—JUDGMENT REVERSED.

DEN *ex dem. of* JACOB BRINEGAR *et al.*

v.

GARLAND CHAFFIN.

Neither party to a deed of bargain and sale is estopped to show, that one of the bargainors was a *feme sole*, although the deed recites that she was *covert*.

EJECTMENT, tried at the last circuit, at Rowan, before his Honor Judge SWAIN.

The lessors of the plaintiff claimed as heirs at law of *Mary Brinegar*; the defendant under a deed of bargain and sale from the same *Mary Brinegar*, which purported to have been executed by her under the name of *Mary Jacks*, jointly with a second husband, *Richard Jacks*; and the only question was as to the validity of this deed. No privy examination of the *feme* had been taken; but the defendant offered to prove, that in fact no valid mar-

riage subsisted at its execution, between *Richard Jacks* and *Mary Brinegar*, as *Jacks* then had a wife living, to whom he had been married before his pretended marriage with *Mary Brinegar*. The lessors of the plaintiff objected to this testimony, insisting that if the defendant claimed under a deed, which recited a marriage between *Richard Jacks* and *Mary Brinegar*, he was estopped to deny that marriage. His Honor admitted the evidence, and the existence, at the execution of the deed, of the former marriage of *Jacks*, being clearly established, a verdict was returned for the defendant, and the plaintiff appealed.

Winston, for the plaintiff, contended, 1st, That a marriage *de facto* drew after it all the legal consequences of a marriage *de jure*, and cited *Morris* v. *Miller* (4 *Bur.* 2057) *Birt* v. *Barlow* (*Doug.* 170) *Alleyne* v. *Grey* (2 *Salk.* 437) *S. C.* (*Comberbach* 131.) 2d. That the defendant was estopped to deny that *Mary Jacks* was a *feme covert*, and cited *Norwood* v. *Stevenson* (*And.* 227) *Co. Lit. s.* 374, 230, 231, *a. Com. Dig, Estoppel, A* 2.

Nash, contra, insisted that the defendant, by accepting the deed executed by *Mary Brinegar*, under the name of *Mary Jacks*, as the wife of *Richard Jacks*, was not estopped to show that she was a *feme sole*, and cited *Moore* v. *Willis* (2 *Hawks* 558) *Co. Lit.* 133, *b.* 3 *Thomas Co*, 431. 2 *do.* 415. *Com. Dig. Estoppel, C. E.* 3. *James* v. *Landon* (*Cro. Eliz.* 37) *Brereton* v. *Evans* (*do.* 700) *Duncombe* v. *Wingfield* (*Hob* 254.) 1 *Thom. Co.* 133. 10 *Vin. Ab.* 455.

HENDERSON, Chief-Justice.—Recitals in a deed are estoppels when they are of the essence of the contract; that is, where unless the facts recited exist, the contract it is presumed, would not have been made. As if A recites, that he is seized in fee of certain lands, which he bargains and sells in fee. He is estopped to deny that he is seised in fee, for without such seisin, it is fair to presume that the contract would not have been made. But if the recital be that he is seised in fee by purchase from C, here neither the bargainor nor bargainee is estopped from averring and proving, that he is seised by

A party to a deed is not estopped by a recital, unless the fact recited be the moving cause of the execution of the deed.

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purchase from D, unless it appear, that the seisin in fee by purchase from C was part of the contract, and without which it would not have been made. For ordinarily the seisin only is of the essence of the contract, and how and from whom derived are but circumstances. So of every other recital. And this distinction reconciles the many apparent contradictions in the books, some declaring that recitals are estoppels, and others that they are not. In the case under consideration, that the *feme* was the wife of *Jacks* was not of the essence of the contract. It formed no part of it. It was a mere circumstance of description, more unfavorable to the defendant, or rather the bargainee, than if she had been *sole*. For if *sole*, the deed was effectual by sealing and delivery. If she was *covert*, her private examination was necessary to make it her deed. In truth, her coverture was a fact, for which the bargainee neither gave nor received any thing. Nor did he on that account receive any thing by the deed, which he would not have received, if she had been *sole*. Neither did it form the basis, nor in any manner move or conduce to the contract. It is therefore mere matter of evidence, and like all other evidence may be rebutted by contrary proof. The evidence therefore, that *Jacks* had another wife living at the time of the marriage, disproving the recital, was properly admitted.

But the case does not rest upon general reasoning. If A. S. by her deed, reciting that she is a *feme covert*, when in truth she is a *feme* sole, grants an annuity, it is a good grant, for that is but a void recital, although the grantee had not put it in his writ; and it cannot be a conclusion to him, when he shows the deed. (*Viner's Ab. M. s.* 8 *pl.* 11 *Perkins s.* 40.) So if a *feme covert*, reciting by her deed that she is a *feme* sole, grant an annuity, this a void grant, and she shall not be concluded by this recital. (*Perkins* 41, *note.*)

The other position taken by the plaintiff's counsel, that a husband *de facto*, embracing the case of *Jacks*, in the present instance, is entitled to all the rights of a husband *de jure*, and the wife subject to all the disabili-

ties of a *feme covert*, leads, I think, to consequences, which make the proposition *felo de se*. It gives all the rights of a husband, both to the person and the property of any woman whom he may either deceive or persuade to have the marriage ceremony performed between them; and all at the same time, thereby investing him with marital rights over one hundred women. It cannot be so. The cases bear the counsel out only in this; (which is reasonable;) that in all but a few cases, perhaps only in cases of *crim. con.* and those which affect the husband in his conjugal rights, an actual legal marriage need not be proven. In those cases it will not do to infer a marriage from circumstances, as long cohabitation, or the like. But in other cases, a marriage may be inferred from those circumstances. In cases of the latter kind, "never united in legal matrimony" is a bad plea; because it draws the question from the courts of common law to the ecclesiastical courts, which require proof of an actual marriage, celebrated according to the forms of the church. Whereas, if left to be tried on the fact of marriage, it will then be tried upon such proofs as the party may offer, viz: either proof of an actual marriage, or proof of long cohabitation. It is not to be inferred from this distinction, that courts of common law will sanction a marriage, by giving to the husband the marital rights, where it is shown that he is entirely incapable of contracting marriage, from any cause, as from having a wife living at the time; altho' the second marriage is attempted to be proven, by showing that the marriage ceremony was actually performed; or by showing a cohabitation and leaving it to be inferred. Whatever may be the effects of such a marriage, whether actually proven or inferred from cohabitation and the like, as to the acts of the woman whom the man calls his wife, in regard to the rights of others, I am satisfied, it confers on him no rights, and imposes on her no disabilities.

Where the husband sues for an injury to his marital rights, he must prove the solemnization of the marriage.

But in those cases, in which *ne unques accouple* is not a proper plea, it may be inferred from circumstances.

PER CURIAM.—JUDGMENT AFFIRMED.

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John Jones v. James Cooke.

A count for money paid to B by A, at the request of, and to the use of C, is supported by proof of the sale of a bond by A to B, and that B credited C with the amount.

Assumpsit, tried before his Honor Judge Daniel, at Franklin, on the last fall circuit. The plaintiff declared in two counts: 1st, on a special contract, and 2d, for money paid to the use of the defendant. Pleas—general issue, and the act of 1826 (*pamphlet* c. 10) requiring a special promise to answer the debt or default of another to be in writing, in order to charge the defendant therewith. On the trial, it appeared, that in May, 1828, one *James C. Jones*, the father of the plaintiff, conveyed all his property, in trust, to indemnify the defendant and others, who were his sureties to a large amount; that in March, 1828, judgments were obtained against the said *James C. Jones*, executions upon which were levied upon the negroes conveyed in the deed of trust; that previously to the sale, the defendant told the plaintiff that he was apprehensive of some loss on account of his suretyship for *James C. Jones*, and that to protect himself, he intended to purchase the negroes levied upon, and re-sell them at a more favorable opportunity; and not being able to raise money enough to purchase negroes to the amount of the executions, he promised the plaintiff, that if he would advance money upon the execution, he should be reimbursed out of the negroes purchased at the sheriff's sale; that the plaintiff accordingly delivered to the sheriff a bond for $525 which the latter received as cash, and credited upon one of the executions, and the balance was satisfied by a sale of a part of the negroes, which were bid off by the defendant; that the defendant afterwards refused to comply with his contract, alleging that the money paid by the plaintiff was the property of his father, *James C. Jones*.

His Honor charged the jury, that if the plaintiff paid the debt of *James C. Jones*, at the request of the defendant, he was not entitled to recover, unless the request was in writing. But if he paid the money at the request and for the use of the defendant, then he was entitled to

a verdict on the last count in the declaration. The jury "found all the issues in favor of the plaintiff," and a new trial being refused, the defendant appealed.

Badger and *W. H. Haywood*, for defendant, insisted that there was no evidence to support the count for money paid.

The *Attorney-General* and *Seawell*, *contra*.

HALL, Judge.—Whether the sum of $525, belonged to *James C. Jones*, or to the plaintiff, was properly left to the jury. It was also submitted to them, whether it was paid for the use and benefit of the defendant by the plaintiff. If it was, they were instructed that they should find a verdict for the plaintiff. They found so accordingly. Two objections are raised upon the record; the first, to the charge of the judge: the second, that the verdict is general, and it cannot be ascertained, upon which of the two counts it was rendered.

As to the first, it appeared in evidence, that the sheriff received from the plaintiff a bond as *cash*, and credited one of the executions with the amount, agreeably to the bargain and understanding the plaintiff had with the defendant. It is argued, that the count for money paid to the use of the defendant, is not sustained by that evidence. It appears to me otherwise. I think the transaction is susceptible of two views. The first is, that the sheriff voluntarily paid the money for the plaintiff, by crediting the executions; for which he had a claim upon the plaintiff. Or it may be taken, secondly, that he purchased the bond for cash, and having the cash in his hands, as belonging to the plaintiff, paid it over for the use of the defendant, as he was requested by the plaintiff to do, in discharge of the executions.

Where the plaintiff declares in two counts, and the attention of the jury is directed by the judge to one of them only, a general verdict, found by them is presumed to be on that count.

With respect to the second objection, nothing was said by the judge to the jury on the first count, on a breach of special contract. Their attention was called to the second count, which was for money paid to the use of the defendant. It may be fairly inferred, and ought to be so taken, that the verdict was rendered on that count. They were directed to enquire, whether the

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money was paid for the use and benefit of the defendant; if it was, they should find a verdict for the plaintiff. I think the verdict was responsive to the charge, and that the rule for a new trial should be discharged.

PER CURIAM.—JUDGMENT AFFIRMED.

THE STATE v. HIRAM CARLAND.

An indictment for perjury charging, that the defendant "being a wicked and evil person, and unlawfully and unjustly contriving, &c. deposed &c." and concluding that the defendant, "of his wicked and corrupt mind, did commit wilful and corrupt perjury," is defective even at common law, for not alleging that the defendant *wilfully and corruptly* swore falsely.

The defendant was convicted, on the last circuit, at Buncombe, before MARTIN, Judge, upon an indictment for perjury. A motion for a new trial was made in the court below, but as that motion was not pressed in this court, it is unnecessary to state the case sent up with the record.

The indictment, after stating the suit, in which the perjury was charged to have been committed—proceeded as follows: "And the jurors aforesaid, upon their "oath aforesaid, do further present, that the said *Hiram* "*Carland*, being a wicked and evil disposed person, and "unlawfully and unjustly contriving and intending, con-"trary to truth and justice, to, &c." [Setting out the several matters sworn with averments contradicting them] and concluded in these words: "And so the jurors "aforesaid, upon their oath aforesaid, do say, that the "said *Hiram Carland*, of his own most wicked and cor-"rupt mind and disposition, did commit wilful and cor-"rupt perjury, to, &c."

Hogg & *Badger*, for the defendant, moved in arrest of judgment, because the indictment did not charge, that the defendant wilfully and corruptly swore falsely.

They argued this point at considerable length, and relied much upon the case of *Rex* v. *Stephens* (3 *Barn. & Cress.* 246.) *S. C.* (11 *E. C. L.* 216).

The *Attorney General, contra.*

RUFFIN, Judge.—The counsel for the defendant, admitting the insufficiency of the objections, stated in the record, as having been taken on the trial in the Superior Court, move here in arrest of judgment, upon the ground that the indictment does not charge that the defendant *swore wilfully and corruptly*.

Under the statute, it is clear the objection is a good one. It seems to be equally so at common law. In our search for precedents, not one has been found, except that in *Cox*' case (*Leach* 69) in which those epithets are not both applied to the act of swearing. They enter into the definition of perjury at common law. And whatever evil intent may be alleged in the indictment as moving the defendant to take the false oath, the very taking of it must be stated to have been done deliberately, and with a wicked purpose, at that moment existing. This has been expressed, by applying those terms *wilful and corrupt* to the act of swearing. *Cox*' case established, that one of them might be supplied by *maliciously*. That has been doubted, and never followed; though I suppose it would be in a case precisely in point. But in no instance hath the omission of both been allowed, though *falsely* and *maliciously* were used. And in a very late case, in the King's Bench, in 1826 (*Rex* v. *Stephens*) this very point came directly before the court; when the indictment was held bad on a motion in arrest of judgment. This is of the more authority, because the statute 23 *George* II. c. 11, provides in that country for simplifying indictments for perjury; as our own does here.

PER CURIAM.—JUDGMENT ARRESTED.

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THE STATE v. WILLIAM HIX.

A retailer of spirituous liquors is not an ordinary keeper within the act of 1801 (*Rev.* c. 581) to prevent excessive gaming, and is not indictable under that act for permitting unlawful games to be played at his house.

The defendant was indicted under the act of 1801. (*Rev.* c. 581) to prevent excessive gaming, in the following words: "The jurors, &c. that *William Hix*, on "&c. being a keeper of a house of entertainment, unlawfully did permit and suffer certain persons to play "in said house an unlawful game, &c. against the form "of the statute, &c." On the fall circuit of 1830, at Montgomery, before MARTIN, Judge, the jury returned the following special verdict: "that certain persons did play at cards for money at the store-house of *William Hix*; and they further find, that the said *Hix* was a retailer of spirituous liquors, under a licence granted by the County Court; and they further find, that the said *Hix* furnished spirits to the said persons, while playing at cards; and they further find, that the said *Hix* did not furnish any other accommodation to travellers or others, except spirits." At the following term, judgment was rendered by DANIEL, Judge, for the State, and the defendant appealed.

No counsel appeared for the defendant.

The *Attorney-General*, for the State.

HALL, Judge.—The acts of Assembly make a difference between ordinary or tavern keepers, and retailers of spirituous liquors. The first are obliged by the act of 1798 (*Rev.* c. 501,) to enter into bond with surety to provide in his ordinary good and wholesome diet, and lodging for travellers, and fodder, and corn for horses. The 7th section of the same act (not published in the last revisal) declares that every person, who intends to *retail spirituous liquors*, without *applying* to the court for *a licence to keep an ordinary house of entertainment*, agreeably to the directions of this act, shall at the time of giving in his list of taxable property, signify the same

to the justice of the peace, whose duty it shall be to report the same to the clerk. (*Iredell's or Martin's Revisal.*) It is obvious from this provision of the act, that the legislature considered that there was a difference between ordinary or tavern keepers, and retailers of spirituous liquors. By the act of 1816 (*Rev. c.* 906) the County Court, when seven justices shall be on the bench, are authorized to licence persons of good conduct and moral character to retail spirituous liquors by the small measure. No bond is required of them, as is required from ordinary or tavern keepers. By the act of 1801 (*Rev. c.* 581) it is declared, that if any tavern keeper or keeper of a house of entertainment, shall suffer any games to be played in his or her dwelling house, wherein he or she lives, or shall furnish such persons with drink he shall be fined, &c. This act, in terms, extends to tavern keepers, or keepers of houses of entertainment, but does not extend to retailers of spirituous liquors. The law has made a difference between them: and as the latter act is a penal one, and only extends to one of them, altho' the other comes within the meaning and mischief of it, we cannot by construction extend it, so as to remedy the mischief, and include the other.

PER CURIAM.—JUDGMENT REVERSED.

THE STATE *v.* BENJAMIN COLLINS.

Where a cause is removed from one Superior Court to another, the latter has the right to issue a writ of *certiorari* to the former, directing a more perfect transcript to be certified.

The defendant was indicted for petit larceny, at Jones, on the spring circuit of 1828. After not guilty pleaded, the cause was removed, upon the affidavit of the defendant, to Lenoir, and was there tried on the last fall circuit, before his Honor Judge DONNELL.

On the trial, evidence was offered by the defendant, that the prosecutor was actuated by malicious motives in

Evidence that the prosecutor was actuated by

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preferring the prosecution—but his Honor rejected the testimony, because it was irrelevant, as the prosecutor was not offered or examined, as a witness in support of the prosecution.

malicious motives in preferring an indictment, is inadmissible, unless he is examined for the state.

In arguing to the jury, the defendant's counsel insisted, that if the evidence was not of weight sufficient to induce them to find a verdict against the most respectable man of their acquaintance, (and the counsel designated a very respectable gentleman known to all the jury, and then in the court-house,) they would not, in law, be justified in finding a verdict upon the same testimony against the defendant.

In summing up, his Honor informed the jury, that the case supposed by the defendant's counsel might mislead them. That the defendant not having introduced evidence of his character, the true rule was, that if the evidence would not justify them in returning a verdict against a person of whom they had never before heard, and of whom they knew nothing but what was disclosed by the testimony, then it would not justify a verdict against the defendant. But it did not follow, that if they thought the evidence insufficient, against a gentleman who brought with him the weight of character they might attach to the very respectable individual designated by the counsel, that it was insufficient against the defendant.

Where the defendant in an indictment for *petit* larceny offers no evidence of character, the jury are to weigh the testimony as if they knew nothing against him, except what was disclosed on the trial.

The jury returned a verdict of guilty, and the defendant obtained a rule for a new trial, because the judge rejected the testimony offered by the defendant, and because of error in his instruction to the jury. The rule was discharged. Upon inspecting the transcript of the record of Jones Court, it was found defective in the following particulars:

1st. It stated the Superior Court of Jones to have commenced on Wednesday the day of March, 1828.

2d. *O. B. Coxe* appeared upon the transcript to have been appointed foreman of the grand jury; but his endorsement on the bill was signed *O. W. B. Coxe.*

3d. The entry of the order of the removal to Lenoir was made in these words: "*Sent to Lenoir.*"

4th. The certificate of the clerk of Jones Court stated it to be a cause in which R. K. is prosecutor, and *Benjamin Collins*, defendant.

For these causes, his Honor declined passing sentence, but directed a writ of *certiorari* to issue to the clerk of the Superior Court of Jones, "ordering him to certify a more full and perfect transcript of the record of the cause in his office."

The record certified to this court, stated, that "in "obedience to the *certiorari*, issued in pursuance of the "order of the preceding term, the clerk of the Superior "Court of Law of Jones County returned here into "court the following transcript." This transcript corrected the defects above specified as existing in the one first certified—as is stated by his Honor the Chief-Justice, in pronouncing the judgment of this court.

Upon the return of this writ, his Honor Judge STRANGE passed sentence on the prisoner, who appealed.

Neither the writ of *certiorari*, nor the return on it, were incorporated in the record transmitted to this court.

Gaston, for the defendant, moved in arrest of judgment, for the defects in the record from Jones, above stated, and insisted that the judge of the Superior Court of Lenoir had no right to issue a *certiorari* to the Superior Court of Jones, they being courts of co-ordinate powers, and further, that the writ was not returned.

The *Attorney-General, contra.*

HENDERSON, Chief-Justice.—It is objected first, that the Superior Court of Lenoir could not issue a *certiorari* to the Superior Court of Jones, to certify to the former a record of the latter court; because they are courts of co-ordinate powers—that such writ, from its nature, can only issue from a superior to an inferior court. It is true, that this is the practical application of the power to issue the writ *in most cases*, because *most commonly*, the records of an inferior court are required in the superior court, for purposes pointed out by law; the latter court having the power of examining and reviewing the proceedings of the inferior court, by way of appeal, or writ of error. But the power to issue the writ does

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not grow out of the superior grade of the court issuing it; but is based on the principle, that such power is necessary and proper to carry into execution, the legitimate power and duties of the court. The court of Lenoir being authorized to act upon the records of Jones court, transmitted to it by that court, where no record, or an imperfect one is transmitted, the power of obtaining the record, grows out of the power and duty to act upon it. And we know of no way more convenient and proper than a *certiorari*. It cannot be by way of request, for then the jurisdiction might be defeated by a refusal. It must be by way of mandate; and if legal, it is the mandate of the law, and must be obeyed. If the record certified was in contradiction to the one on file, the court could act on neither, for each had equal authority. It could not be ascertained which was correct. This point occurred in the case of the *State* v. *Curry*. In that case, by order of the court to which the cause had been transferred for trial, the clerk of the court from which it was sent, attended with the record itself, and the record transmitted was made conformable to it. This court, after great deliberation, argument and examination of precedents, affirmed the proceedings. If the records are not contradictory, but the one only more full than the other, explaining absurdities and contradictions, and filling blanks, they may be proceeded on. And in fact, they both form but one copy. Such we think is the case in the present instance.

The right of issuing writs of *certiorari* is not founded on the circumstance, that the court from which it issues is superior to that to which it is directed; but upon the principle, that all courts have the right to issue any writ necessary to the exercise of their powers.

Where upon the removal of a cause, two contradictory copies of a record are certified, the contradiction can be reconciled by an inspection of the original record, by the court to which it is removed.

But where the transcripts are not contradictory, they form but one copy, and both may be used by the court.

The first objection to the record is, that there is a blank in stating the time, when Jones Superior Court was held. It is stated to be on Wednesday, the day of March, 1828. This blank is filled in (what may be called for distiction) the certified copy. We say nothing on the point, whether there was any thing it.

The second is, that in stating the names of the grand jurors upon the record, *O. B. Coxe* is stated to be foreman. And in his, the foreman's indorsement he styles himself *O. W. B. Coxe*. This is amended on the certified record. In that it appears from the record of the appointment of the grand jurors, that *Owen B. Coxe* is appointed fore-

An indorsement, by the foreman of the grand jury of the initial letter of his first name,

man; and the indictment is indorsed "a true bill—*O. B. Coxe*, foreman." This variance cannot in such case be material; and the court by receiving and ordering the indictment to be docketed, recognize him as the same person. Indeed I have been much at a loss to see the necessity of any indorsement. The grand jury come into court, and make their return, which the court records, not from that memorandum made out of court, but they pronounce or are presumed to pronounce it in court. It is not the indorsement which is the record, but that which is recorded as the jurors' response. The indorsement is a mere minute for making the record. But I believe the law is understood to be otherwise.

where the record of his appointment states his name at length, is not a material variance.

The objection, that the order of removal is not complete, is removed by the certified copy. The clerk sent at first a mere minute of an entry, which I suppose he extended.

The next objection is, that the *certiorari* was not returned. It certainly would have been more regular to do so; and it must have been returned, if it was to give the court jurisdiction. But in this case it does not. The only purpose which it could answer, would be to show, that the record filed was made out and filed in obedience to the writ; that it was not an officious act, or the act of a stranger. The records of Lenoir show, that a *certiorari* was awarded, and the certified copy shows, that it was made out in obedience to that writ. I think that this is sufficient. I omitted noting the objection, that the record first sent states the case to be one wherein *Reddin Kent* is prosecutor, and *Benjamin Collins* is defendant. This is a mere misnomer of the case, which the clerk himself has given to it. He states it at large showing what it is, to-wit, an indictment, which of course is at the instance of the state, and *Benjamin Collins* defendant. But be it as it may, it is amended by the certified copy.

Writs, which give jurisdiction to a court, must be returned; and both the writ and the return must appear upon the record; but this is unnecessary, where the writ was issued in the progress of a cause, and is merely auxiliary to its determination. A writ of *certiorari*, to certify a more perfect record, is of this latter description.

The grounds for a new trial I suppose were abandoned. They were not urged. But if they were, they would not have availed, for the reasons given by the presiding judge.

PER CURIAM.—JUDGMENT AFFIRMED.

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The State v. Bryant Britt.

In the act of 1801 (*Rev. c.* 572) to prescribe the punishment for forgery, the words "shall show forth in evidence any forged deed," &c. are confined to the exhibition of it as evidence upon a judicial proceeding, and are not equivalent to the words "utter and publish" in the statutes against counterfeiting.

This was an indictment for forgery, tried before his Honor Judge Daniel, at Robeson, on the last circuit.

The first count charged the defendant with having forged an order for the delivery of goods, with intent to defraud *John H. Powell.*

The second count charged him with the forgery of an order for the payment of money, with a similar intent.

The third with having in his possession a forged order for the delivery of goods, and with "uttering and publishing it as true," also with the intent of defrauding *Powell.* The fourth count was exactly similar to the last except that the order was charged to be for the payment of money.

The testimony was, that the defendant, having in his possession a forged order directed to *John H. Powell,* and purporting to be signed by one *Jacob Britt,* whereby *Powell* was requested to let him, the defendant, "have the amount of six dollars," presented it to *Powell,* and received the amount, either in money or in goods. That the defendant, upon being charged with the forgery, said he intended to have taken up the order before it was discovered.

Upon the defence it was proved, that there was another *Jacob Britt* in the neighborhood, besides the one whose name was alleged to have been forged, but he was only sixteen years of age. No evidence was offered, that the order was in the handwriting of the defendant, or that of *Jacob Britt* Junior. On the trial many exceptions were taken for the defendant. The only one necessary to state, is the following, viz: That the third and fourth counts of the indictment charged that the defendant did "utter and publish as true" a forged order,

which was not an offence within the statute; as the words of the act of 1801, "to prescribe the punishment of forgery," (*Rev. c. 572*) were, "*shall show forth in evidence*," and the words "*shall utter and publish*" were entirely omitted in it.

Upon this point, his Honor instructed the jury, that the words "*utter and publish*," used in the indictment, were equivalent to the words "*show forth in evidence*," used in the statute, and that the indictment described the offence sufficiently, without using the very words of the statute. His Honor further informed the jury, that the forgery of an order for the delivery of goods, was within the act of 1801, and that it made no difference whether the order was for the payment of money or the delivery of goods.

The defendant was acquitted upon the first and second counts of the indictment, and convicted on the third and fourth, and judgment being rendered on the verdict, he appealed.

Badger, as *amicus curiæ*, suggested, that by the 15th section of the statute 5th *Eliz.* it was provided, that "this act, nor any pain, forfeiture or thing therein contained, shall extend to any attorney, lawyer or counsellor, that shall, for his client, plead, *show forth*, or give in evidence, any false and forged deed, &c. for true and good, being not party or privy to the forging of the same." That the 16th section of the same act was a proviso in favor of any person, who "may plead or show forth in evidence any deed, &c. exemplified under the great seal, not knowing," &c. He argued from these provisos, that the words "show forth in evidence," meant exhibiting in a judicial proceeding; and further, that the words in that statute being, "shall pronounce, publish, or show forth in evidence," and that the words *pronounce and publish* being omitted in the act of 1801, the omission must be taken to have been by design.

The *Attorney-General*, for the prosecution, contended, 1st, that the words "utter and publish," were equivalent to the words "show forth in evidence," and cited

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the act of 1801 (*Rev. c.* 572) and *Archbold Crim. Plead.* 194.

2d. That the indictment was good at common law, and cited 2 *Russell* 1456. 2 *East P. C. c.* 1987.

The forging of an order for the delivery of goods is within the act.

3d. He was about to cite an authority to prove, that the forgery of an order for the delivery of goods, was within the act of 1801—but the court observed, that on this point, there could be no doubt.

Ruffin, Judge.—There seems to be no reason to doubt the correctness of any of the opinions pronounced in the Superior Court, except that which relates to the force of the words "utter and publish," in the third and fourth counts. They were held to be synonymous with "show forth in evidence." The former phraseology is that of the statutes relating to counterfeit money; the latter, of the acts for punishing forgery of private instruments. The different subjects may, of themselves, account for the difference of the terms used; and seem to require a different meaning. But there is a decisive argument to be drawn from the statute 5 *Eliz. c.* 14, from which ours is taken. The words of that statute are "shall pronounce, publish or show forth in evidence" (of which this last expression is alone retained by us) "any such false or forged deed &c. as true, knowing the same to be forged &c. (*except being attorney, lawyer or counsellor, he shall for his client, plead, shew forth or give in evidence such false or forged deed, &c. to the forging whereof he was not party or privy,*) and shall be thereof convicted, &c." This plainly restrains the meaning of "showing forth or giving in evidence," to a giving of the deed in evidence in a court of justice; and is altogether a different thing, from the mere exhibition of it in *pais*. The words "pronounce and publish" in the English act are not found in ours. We are consequently constrained to construe the words in our own act, as the same words are used in that of *Elizabeth*. And the omission of the other terms must be held to have been intentional in the legislature; and the more especially, as the acts against counterfeiting all have "utter and publish" in them, and omit "show forth in evidence."

A new trial must therefore be granted, altho' the case seems fully to justify a conviction, upon the two first counts, for the forgery itself, if the testimony was entitled to credit enough to authorize the verdict given upon the other counts. That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof, that either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument—that he either did the act or caused it to be done—until he showed the actual perpetrator, and that he himself was not privy. It is very different from having a counterfeit bank note. That is an instrument current in its nature and use, and may well come innocently to one's hands. But it is next to impossible, that the defendant could get possession of such an instrument as this, purporting to be for his own benefit, without having fabricated, or aided in the fabrication of it. If the instrument be a forgery, he who holds it under such circumstances is taken to be the forger, unless he shows the contrary.

One found in possession of a forged order in his own favor, is presumed either to have forged it, or procured it to be forged, until the contrary appear.

But for the error already mentioned, the verdict must be set aside, and the case go to another jury.

PER CURIAM.—JUDGMENT REVERSED.